THE

MONTHLY LAW REPORTER.

OCTOBER, 1857.

OF CONVEYANCES BY RAILROAD CORPORATIONS OF THEIR FRANCHISES AND OTHER PROPERTY.

This Essay, which our readers will find very carefully studied and well written, took the first prize at Cambridge. Mr. Martin, of Claiborne County, Mississippi, is the author. We believe he intends to pursue the practice of law at St. Louis. — Ed.

A Railroad Corporation is a servant of the public; and although it is not without interests of its own, those interests are only secured and advanced by a faithful discharge of the duties for which it was created. It derives its origin and its powers from a charter, which is, at the same time, a record of its creation as well as the contract of its undertaking. The charter is a contract with the public, in which the State grants certain rights and privileges in consideration of benefits to be enjoyed by the people.[1] The increased facility of travel is the equivalent for the privilege of taking tolls. The nature of this contract imposes obligations upon both parties; while the State cannot alter or annul what it has granted,[2] the corporation cannot abandon its undertaking at pleasure.[3] But so transcendent is the idea of their subserviency to public use, as public works and improvements, and as holding their rights in trust for that alone,[4] that according to the legal interpretation of their nature, they have not only been created for the public convenience, but may be condemned and destroyed for a greater public use.[5] It is in consequence of this feature that Chief Justice Shaw ranks them with "turnpike-roads, highways, and town ways."[6] Indeed it is from no other principle than that of the

[1] 1 Am. Rail. Cas. 40; 1 Am. Rail. Cas. 20.
[2] 27 Miss. 538.
[3] 2 B. & Ald. 646.
[4] 1 Am. Rail. Cas. 352.
[5] 2 Am. Rail. Cas. 84; 11 Pet. 638.
[6] 1 Am. Rail. Cas. 295.

public good, the legislature derives the power to grant to corporations the right to construct their works to the destruction of private property, and without the consent of the owner.[1] The principal franchise granted is an exclusive right of way, which, as a general thing, is a mere easement on the land,[2] although in some States a determinable fee is condemned,[3] and in nearly all, an absolute fee may be acquired by voluntary conveyance. All the powers and franchises are bounded by the charter, and the company is protected in the enjoyment of none except what are thus specified, or are necessary to carry them into effect.[4] These franchises, according to the rules of the common law, are to be construed strictly against the company, and in favor of the sovereign power that grants them.[5]

With these prefatory remarks upon the general nature of a railroad's "chartered rights," we propose to analyze and discuss a single one of them; viz.: "the right to convey whatever they own." We propose to develop it in the following order, which suggests itself to us as the best adapted to the nature of the subject, and the limits of an essay.

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[1] 1 Am. Rail. Cas. 295. [2] Ibid. 218. [3] Ibid. 256.
[4] 2 Kent, Com. 248; 1 Am. Rail. Cas. 165; 15 O. 31; 5 Coms. 560; 15 John. 358.
[5] 7 M. & G. 253.

FIRST DIVISION.

Conveyance of their Franchises.

Alienation not an Element of a Franchise. — Where a franchise has, by express grant, a transferable nature, there can be no question about the conveyance of it, if effected according to the terms of the charter; but when that instrument is entirely silent upon this subject, there has existed some difference of opinion as to whether the right to convey is of the essence of the privilege itself. It has been said that a franchise is an incorporeal hereditament, and therefore can be bought and sold.[1] But this proposition is too broad. Some franchises are and some are not incorporeal heraditaments; and those of corporations aggregate may be classed among the latter, since there is no inheritable quality in them.[2] On a brief examination of a corporate franchise, a reason against its conveyance is quite obvious.

A corporation is not self-created, and unless granted in the charter, it has not the power of destroying itself, except by surrender to government.[3] The very act of its creation refutes the idea of its possessing such a power, for it might at any moment frustrate the design of the legislature in thus calling it into being. Besides this, its existence, as we have said before, is in the nature of a contract, and of course cannot be abrogated without the consent of both parties. Now it seems that the conveyance of a franchise, without the consent of the granting power, does involve the power of self-destruction; for if it has the power to convey one franchise, it has the power to convey all. But when they are all gone, the corporation has ceased to exist, for we cannot conceive of a corporation destitute of every corporate privilege.

This question, however, is abstract and impracticable in its nature; for, admitting that a corporation has the incidental right to dispose of its franchises, it does not follow that any other corporation or person has the power to purchase them. It would be very far from carrying out the design of the legislature to permit an individual to possess and exercise the privileges, granted and adapted to a corporation aggregate. It would also be illegal for another corporation to purchase and make use of franchises foreign to its charter.[4] So that in reality it has been necessary for one to get permission to purchase, which is given in terms empowering the other to sell.[5]

Conveyance of Franchises in England. — Whatever may be the theoretical or common law power of railroad corporations, the

[1] 2 Am. Rail. Cas. 84.
[2] 3 Kent, Com 459.
[3] 15 Pick. 351; 6 Gill & J. 205.
[4] 11 Pet. 541.
[5] 9 Ga. 390; 27 Miss. 532.

law in England, where this subject has engaged the attention of the courts and the legislature, is clearly settled as to their actual and present power. And neither in the acts of parliament nor in the decisions of the courts, do we find that they ever enjoyed or ever claimed the right to dispose of their privileges without the consent of government.

In the 8th and 9th Vict. ch. 96,[1] which comprises the statute law of the subject, future railroad corporations are prohibited from selling or leasing their franchises, except under distinct provisions of parliament to that effect, specifying by name both parties to the conveyance. This act was passed, not for preventing unauthorized conveyances, something which had never yet happened, but for prohibiting them from parting with their rights, even when they had the power in their charters to do it. Thus when they had the power of alienation, expressly granted at the time of their creation, this act imposed the necessity of obtaining the consent of parliament to every transfer.

In examining the adjudged cases, we shall find that the English courts have not departed from a strict interpretation of the statute. In 1848 a bill was filed in chancery for the specific performance of an agreement, entered into by a railway, to convey to an amalgamated company all its property and franchises, provided that the sanction of parliament could be obtained. The bill was granted, the court being of the opinion that the contract was a legal one, although it could not take effect till the necessary permission was received.[2] It was also decided in 1852, that a railroad, without the consent of parliament, could not delegate all its rights to another, as it was giving to that other rights which could be obtained only from the sovereign.[3] It has been repeatedly decided that an agreement by a railroad to hand over its line to the management and control of another company is void.[4]

Neither is such an agreement rendered valid by the consent of the shareholders, for although it might bind them personally, it would not render the property of the corporation liable,[5] as it could not be construed a corporate act. The general doctrine of non-conveyance received the sanction of Baron Alderson, in which he declared that any unauthorized disposal of corporate rights was against the policy of parliament in granting them, and, therefore, illegal.[6] So that the question by these and other decisions no less explicit may be considered at rest.[7]

All cases of the amalgamation of companies, in which the franchises of different corporations are fused into one, are decided

[1] 2 Shelford on Railways, 551.
[2] 2 Phil. Ch. 604; S. C. 12 Jur. 106.
[3] 12 Eng. Law & Eq. 224.
[4] 6 Eng. Law & Eq. 106.
[5] 7 Eng. Law & Eq. 505; 11 C. B. 775.
[6] 16 Eng. Law & Eq. 180.
[7] 9 Hare, 313; 13 Eng. Law & Eq. 506.

upon the same principle. The consolidation can be effected only by the statutes, and the special acts of parliament.[1]

Conveyance of Franchises in the United States. — It is not to be expected that the American law should differ materially from the English, since the subject is adjudicated upon in the same age, and holds the same relation to both countries. The difference is only what would naturally arise between the decisions of the courts of separate sovereignties, and those of a consolidated empire. While the law in some States affirms the general doctrine by implication, that of others directly supports it in statutes and reports. In Ohio and Illinois there are general statutory provisions, by which railways may sell their franchises and property to other roads intersecting by continuous lines.[2] This sale can only be effected by the consent of the majority of the stockholders of each corporation. In Maine and Vermont the same power has been granted in the charters of different companies.[3] An extensive power of sale was granted to the Vermont and Massachusetts Railroad Company, by the Vermont legislature, by which it was enabled to sell to the Connecticut River Railroad Company, or any other railroad company, that part of its line within the State of Vermont.[4]

Such acts as these reflect the law of the land, by showing the necessity of granting to railroads the power of conveyance, where a transfer is to be effected. We can find nothing in the form or substance of these acts, restraining the general power of conveyance, which would be necessary if there was such a power; or if there was any object in following out the special authority; for otherwise it might be defeated by a sale to any other road or in any other manner.

Although this subject has not come up often in our courts, yet in the instances in which it has appeared, there has been a singular unanimity of opinion. And now the very highest authority will have to be overruled before the law can be otherwise than it is.[5] A condensed notice of a few of the leading cases will quickly show this.

In *State* v. *Rives*, a railroad was levied upon and sold, under an execution for debt. Here the question was promptly met, and the court decided that nothing but the land, not the easement or franchises, passed by the sale,[6] because the court could not decree the sale of anything which the corporation itself could not dispose of.[7] We may add that the sale of the property in this case was

[1] 19 Eng. Law & Eq. 87; 11 C. B. 254; S. C. Id. 327; 8 Excheq. 584; 2 Rus. & M. 470.
[2] Stat. Ill. P. ii. ch. 93, (150); Swan's Rev. Stat. O. ch. 29, (41).
[3] 1 Rail. Laws & Char. 20; Ibid. 224, 682.
[4] 1 Rail. Laws & Char. 807.
[5] 5 Iredell, 297.
[6] 5 Iredell, 306.
[7] 5 Iredell, 301.

declared void, as the time and place of sale were not strictly observed as laid down in the statute.

In *Arthur* v. *Commer. Rail. Bank. Vick.*,[1] the corporation conveyed its property to others, in order to preserve the integrity of its charter, by having its road completed within a certain time. Although this case was appealed from the court of chancery, and the decision of it reversed as concerned the conveyance of the property, yet both courts agreed that the franchises could not pass in such a conveyance, as they were inalienable without the consent of government.[2]

Another decision was rendered in 1854, in case of the *Troy and Rutland Rail. Corp.* v. *Kerr*.[3] Here the company conveyed a part of its line absolutely, and leased the rest during the continuance of the charter. And although the point did not necessarily come up in the decision of the case, yet the court, following the English cases, was of the opinion that these acts were *ultra vires*. The principle of non-conveyance has also found favor in the supreme court of the United States, where legislative authority was decided to be the only basis upon which railroads could be consolidated.[4] This fusion of their rights by transfer forms a new corporation, embracing the rights of the original companies and no more.[5] The union can only be consummated by a strict pursuance of the acts authorizing it.

Other cases might be cited in support of this principle, but it is unnecessary as they all use the same language.[6]

It may be remarked that the doctrine is not new in its application to railroads, but is based upon the law regulating corporations of all kinds.[7] In one of the cases referred to,[8] the city of Washington was vested with the franchise of drawing lotteries. The supreme court decided that in consequence of the nature of the right, the city could not so dispose of it, as that the drawing could be effected upon any other account or responsibility than her own.

Thus far we have gone through with the law of direct conveyance, and have found it adverse to anything of the kind. And why should it be otherwise? If railways were permitted without legislative permission to convey to each other their privileges, it would be within their power at any time to create gigantic agencies that might scorn the control, and rival the supremacy of govern-

[1] 9 Sm. & M. 431; 1 Sm. & M. 207.
[2] 1 Sm. & M. 269.
[3] 17 Barb. S. C. 581, N. Y.
[4] 10 How. U. S. 376.
[5] 1 Am. Rail. Cas 38.
[6] 27 Miss. 217; 6 Rob. 246; 9 Ga. 377.
[7] 12 Wheat. 4; 13 S. & R. 212; 3 Coms. 258; 2 Doug. 530; 13 Mass. 477; 22 Pick. 472; 7 Wend. 412.
[8] 12 Wheat. 41.

ment itself. But the people, ever jealous of their rights, ever justly fearful of the influence of capital in the hands of privileged power, may rest assured in this security which the courts have rendered them. A barrier has thus been raised against the monopoly and oppression to which the railroad system might be prostituted, while the companies themselves are not the objects of government plunder, as corporations have been in other nations, but are protected in the enjoyment of their rights, by the plighted faith of a free people.

Lease of Franchises. — The power to lease considered as the power to convey for a determinate period,[1] is necessarily involved in the discussion of this subject. The same statute in England that prohibits the sale of a franchise, forbids also the leasing of it, except by special consent of parliament.[2] The object of this was to guard against the amalgamation of corporations, which was becoming a source of fraud to stockholders. Before it was enacted, a person in becoming a subscriber, could know but little of the enterprise in which he was embarking, for nearly all the companies had the power of leasing their lines, and could transfer his responsibility at pleasure.

When under authority of this statute a railroad is leased, the lessee is substituted in the place of the lessor, and is immediately responsible to government upon every obligation which the charter imposes.[3]

There seems, however, to be an exception to the power of leasing in the 87th section of the act.[4] The use of a road may be hired out to another company, for the purpose of carrying over it part of its traffic. This clause confers a convenient privilege upon intersecting lines. But the interpretation of the courts has held them strictly to the spirit and meaning of the statute.[5] The lease is void when made or used for any other purpose. With this exception every company is required to work its own line. For, where the road is leased without the consent of parliament, the privity of the contract is gone; there is no longer any guaranty that the road shall be used according to the grant.[6] That privity is only preserved by the santion of parliament to every lease.

This restraint upon leasing would seem to be no less necessary than upon absolute alienation, for the same end can be accomplished, and the same evils produced by repeated leases as by a conveyance.

The American law upon this part of the subject is analogous to

[1] 2 Bouvier's Inst. 257.
[2] 8 & 9 Vict. ch. 96.
[3] 8 & 9 Vict. ch. 20, (513); 2 Shelford on Railways, 535; 20 Eng. Law & Eq. 418.
[4] 8 Vict. ch. 20, (87) s.
[5] 13 Eng. Law & Eq. 506; 6 Ibid. 106; 22 Ibid. 531.
[6] 19 Eng. Law & Eq. 584.

the English. Both agree in the principle that the consent of the legislature is essential to the validity of a lease. But they differ in the manner in which that consent is given and accepted; for while one requires the sanction of parliament to each lease, specifying the parties, the other is satisfied with the general power of leasing, expressed in the charter or in the statutes. Perhaps our law is no better embodied than in four cases which were decided as late as 1854. They were all decided in the same year; so that they do not rest upon each other, but are examples of independent investigations arriving at the same conclusion.

In *Murch* v. *Concord Railroad Co.*, the defendant let the use of its track to the Northern Railroad Company. The plaintiff brought suit against the lessor for the injurious act of the lessee.[1]

The court decided that the lessor was not responsible. For the lease being legal by authority of the statute, the lessee had assumed the responsibilities imposed by the charter, and the suit therefore should have been brought against that company. There was no privity of contract between the lessor and the plaintiff.

In *Troy and Rutland Railroad* v. *Kerr*,[2] the court adopted the same doctrine, citing the English authorities.

In *New York and Ind. Line Rail. Co.*,[3] the United States supreme court decided that the plaintiff, having leased its line without authority from the legislature, was responsible for the lessee's acts. The company not having the power to lease its track, every act under authority of its charter was considered in law either its own or that of its agents.

In *Nelson* v. *Vermont and Canada Rail. Co.*,[4] it was decided that the lessors were responsible for the lessees' acts. In this case the court seemed to think that the public might hold the lessees responsible if it chose to do it.

But in 1855, the legislature enacted[5] that the lessee should be responsible alone, as being substituted in the place of the lessor. The law now in Vermont may be considered the same as in the other States. From these cases we may safely conclude that a railroad, without the consent of the legislature, cannot lease its rights; and that where it does thus wrongfully lease its privileges, it is responsible for the acts of the lessee; and that where it leases by permission of the legislature, the lessee is held immediately responsible to the government.

In Vermont and Illinois, railroads seem to have an unlimited power of leasing their rights, as it has been conferred by statutes,[6] and declared incident to every company, whether repeated in the charter or not.

[1] 9 Foster, 10.
[2] 17 Barb. 581.
[3] 17 How. U. S. 30.
[4] 26 Vt. 721.
[5] Laws, Vt. 1855, p. 31.
[6] Comp. Stat. Vt. sec. 34, (41); Rev. Stat. Ill. p. ii. ch. 93, (168).

In Massachusetts and New Hampshire and Ohio, a company can lease its line to only contiguous and intersecting lines,[1] and a lease, therefore, to a distant company would be void.

This is all statute power, and would seem to confirm the rule by the implication that unless thus specially granted, it could not be possessed at all.

Mortgage of Franchises. — If a railroad has not the power to convey its franchises by direct and absolute sale, nor to lease them without legislative authority, it ought to follow, as a logical sequence, that it should not mortgage them without the same authority; for what is a mortgage but a conditional conveyance?[2] A corporation can mortgage whatever it has the power of selling,[3] as the greater power includes the less. The principal part of a mortgage is the deed, which depends like any other deed upon the power and title of the maker. If he has not the power of disposing of his title, then nothing passes by the deed. This view is equally applicable to a mortgage, considered as a pledge or as an estate. The very idea of security embraces the idea of alienation; the possibility of the property passing from one's possession to another's.

Neither is this view affected by the fact that the mortgagee on failure of the condition, does not take the property as if directly conveyed to him, but must sell it after foreclosure, or by authority contained in the mortgage, thus paying his own debt and giving back the balance. For where does he himself get the power to sell, except through the validity of the mortgage, as a conveyance? We may infer, therefore, on principle, that a corporation without the power of conveyance cannot hypothecate its franchises.

According to Chancellor Kent,[4] "a power to mortgage includes in it the power to execute a mortgage with the power to sell," and of course no such mortgage could be executed, unless the mortgager himself had the power to sell.

The English law, consistent with theory, is in accordance with this view. There it is laid down as an incontrovertible proposition, that a railroad can neither legally nor equitably mortgage its undertaking without the consent of parliament.[5]

The power of mortgaging is confined to the power of borrowing money. According to the statute they can mortgage their undertaking only, when authorized to raise money to carry it on.[6] And where money is borrowed in a manner and to an amount unauthor-

[1] Sup. Rev. Stat. Mass. 71, (1836 – 49); Rev. Stat. N. H. 277; Rev. Stat O. ch. 29, (41).
[2] 5 Wend. 591.
[3] 4 Kent. Com. 144.
[4] 4 Kent, Com. 147.
[5] 19 Eng. Law & Eq. 518.
[6] 8 & 9 Vict. ch. 16, (38).

ized by their charters and special railway acts, the securities have no legal validity.[1]

It has been laid down in the courts of our own country that a railroad cannot, without legislative authority, mortgage its franchises. In Louisiana it was held beyond their power to pledge their right of way.[2] It was held in the supreme court of Alabama, that a railroad had the general power to mortgage its property, but that the legislature in the case before the court, had conferred the additional power of mortgaging their franchises for the security of borrowed money.[3]

A distinction of late has been taken between the different franchises of a railroad, which bears materially upon the right of mortgage and transfer. It has been maintained by some that the franchises of owning, managing, and operating a railroad, having nothing personal in their nature, are alienable like any other kind of property. The advocates of this position all admit in order to construct their distinction, that the right of being a corporation is an untransferable franchise on account of its peculiar nature. But the arguments they use in explaining its peculiar nature are quite as applicable, we think, to those franchises which they wish to prove transferable.

What element is there in the right of being a corporation which forbids its transfer? We are answered that the sale of this right is equivalent to the creation of a new corporation, which being an attribute of sovereignty, cannot be exercised by any other power than the State. But in what respect is this transfer a new creation? It is the same franchise after as before the sale — a franchise to be a corporation of a certain name, embracing a certain number of corporators, and to exist for a certain time. We challenge any one to show a change in anything except the owners of the right, and this change takes place in the transfer of everything. The legislature, when it grants the permission to convey, does not look upon it as a new creation, but views it as the transfer of a privilege already in existence.

But why does this resemble a new creation, and, therefore, the ursurpation of an attribute of sovereignty? There is but one reason possible, and that is that the grantor undertakes to convey to the grantee what he could otherwise obtain only from the government. Now if this is a usurpation of sovereignty, which it is not our interest to deny, it is equally a ursurpation of the powers of government, to transfer the right to take tolls on a railroad, or the right of eminent domain, for it is only from the government that these rights can be acquired, on account of their peculiar nature. If, therefore, one of these franchises cannot be transferred, there remains no reason based on their difference why the others may be. The citizens can obtain the right of being a corporation only from

[1] 7 & 8 Vict. ch. 85, (19). [2] 3 Rob. 513. [3] 11 Ala. 454.

the government, and we see that it is to the same source they must go to get the right of taking tolls. So much for the imagined difference between these privileges.

Again, if it is admitted (and we think it is clear beyond all doubt), that a railroad is a public highway, then it follows that the privilege of taking tolls, like all other privileges of the railroad, is held in trust for the public. And if a railroad, in respect to its franchises is a trustee, it is certain that it cannot divest itself of these trusts of its own accord.

This doctrine Chief Justice Shaw has applied to the property of the company. "It is true," he says, "that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation, but it is in trust for the public."[1]

In reference to the transfer of the minor franchises, the United States supreme court says: "This conclusion implies that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its rights to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation, to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency, provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature."[2]

Similar language in reference to leasing, is to be found in one of Chief Justice Redfield's decisions. "Unless we can hold the defendants thus liable, they might put their roads into the hands of corporations or individuals of no responsibility."[3] "The public can only look to that corporation to whom they have delegated this portion of public service. Certainly they are not bound to look beyond them, although they may doubtless do so."

Chief Justice Perley, of New Hampshire, in a late decision holds to this view: "They may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any other corporate right or franchise."[4]

It seems to us that a sale or mortgage of these franchises would also militate against a correct construction of the charter, as it is not probable at all that the right of being a corporation would be granted in the same charter with the other franchises, unless it was intended to be exercised in connection with them; or unless it was

[1] 1 Am. Rail. Cas. 352.
[2] 17 How. U. S. 721.
[3] 26 Verm. 721.
[4] 32 N. H. 504.

deemed necessary to a safe possession of them; for the simple right of being a corporation is by itself useless.

We shall find, however, in examining the books that not a few corporations have taken it upon themselves to issue securities without waiting for the proper authority.

The Richmond Dock Company,[1] mortgaged its property and rights to the Board of Public Works. The mortgage was foreclosed and the dock decreed to be sold. A bill was then passed in the legislature, giving to another corporation the power to purchase it. This shows that the sale of the mortgaged dock was effected only by the intervention of the legislature in creating a purchaser. In other words, the conveyance never could have been rendered absolute in a practical point of view, without legislative authority of some kind. And for this reason we think the mortgage ought to have been declared void. For if no one could purchase and hold the franchises of the dock without the consent of the legislature, any conveyance of them before that consent was obtained, was imperfect on account of the inability of the purchaser. We do not think the mortgage was good as a mortgage, as it depended upon the will of the legislature whether the property ever could be sold and the money paid.

A singular case happened in Georgia,[2] where a mortgage was foreclosed, and a railroad, with all its franchises, sold to satisfy its creditors. But here again the legislature was called upon to pass an act creating a capable purchaser, which was done. And it was only through the efficiency of this act, that the mortgage was made available as a conveyance for the security of debt.

In Massachusetts a railroad is compelled, when required, to mortgage its franchises for the security of money borrowed from the Commonwealth.[3] It does not appear that they have the power to mortgage in any other mode. In New York[4] and Illinois,[5] a company can borrow money from any one, and mortgage its franchises as security for payment. This power, however, is usually confined to the objects and wants of the road. In Ohio,[6] the only security authorized by statute for borrowed money, is "a pledge of the property and income." The power is not there given unless the word "property" is taken to include the franchise.

Assignment of their Franchises.— The law against the assignment of their franchises by insolvent companies, is clear and settled. They cannot assign them, even to further the aim of their creation; such an act not being considered as incidental to an exercise of their chartered powers, by which that aim is supposed to be best advanced. "They cannot be assigned to others to be

[1] Grat. 364.
[2] 9 Ga. 377; 1 Kelley, 435.
[3] Sup. Rev. Stat. Mass. ch. 99, (4).
[4] 1 Rev. Stat. N. Y. (4th ed.) 1232.
[5] Rev. Stat. Ill. P. ii. ch. 93, (170).
[6] Swan's Rev. Stat. O. ch. 29, (31).

exercised by them as trustees or otherwise,"[1] "as the power of alienation does not extend to that subject."[2] And in all cases where a railroad may assign its property to pay its debts, it is to be understood as reserving its franchises. This reservation preserves the existence of the corporation, although a conveyance of its tangible property might injure the use of its privileges.[3] The assignment when authorized is usually regulated by statute. The mode prescribed in Massachusetts might be mentioned as illustrative of this.[4] A petition is first drawn up and sent properly signed to the commissioner of insolvency, who thereupon directs the sheriff as messenger to give public notice of the insolvency, and to call a meeting of the creditors. After the creditors have chosen one or more assignees, and the debts have been proven upon oath according to law, the commissioner, not the corporation, conveys by an instrument under his hand and seal, all the property and privileges of the corporation to the assignees. These assignees may convey them to any who may become the purchasers thereof; which purchasers, by taking the proper steps, can erect themselves into a corporation with all the rights of the former company.

Conveyance to Government. — The last conveyance which we deemed it necessary to notice as within the limits of our subject, is the conveyance to government by purchase and not as a surrender. This kind of conveyance is most certainly within the doctrine thus far maintained, since authority cannot be said to be wanting, where the State is one of the parties to the transfer.[5] Such conveyance is sometimes imposed as an obligation upon the company after a certain number of years. And it may be exercised voluntarily; as the exercise of it necessarily involves the full consent of the grantor.[6]

The Mode in which the Power to Convey may be Accepted and Exercised. — Where the power to transfer is expressed in the charter, the mode in which it may be exercised is usually prescribed also. It is generally given to the directors. When that is the case a majority vote of them is sufficient. But where by the charter it is not intrusted to any particular body, it can then be exercised only by a majority vote of the stockholders, since it is their province to exercise every corporate power not specially provided for.[7] After the vote has been taken, it will then be the

[1] Bur. on Assig. 559; 9 W. & S. 27; 3 Barb. Ch. 119.
[2] Bur. on Assig. 564; 5 Iredell, 307.
[3] 5 Iredell, 307.
[4] Sup. Rev. Stat. Mass. ch. 327, secs. 1, 2, 3, 4, 6.
[5] 9 B. Monroe, 472.
[6] Comp. Stat. Vt. T. 12, (73); 7 & 8 Vict. ch. 85, (1 Shel. Rail. 41); Sup. Rev. Stat. Mass. ch. 167, (6), p. 1023.
[7] Ang. & Am. Corp. 157.

duty of the directors or the president,[1] or some authorized agent,[2] to carry out the will of the company by signing and sealing the instrument of conveyance, since the members themselves can act only by vote.[3] A majority vote is sufficient, on the principle that it is in the exercise of a corporate privilege expressly granted; and that every stockholder in becoming a member, has agreed that the majority shall control the minority in the exercise of all corporate powers.[4]

But where the power to transfer is not originally granted in the charter, but is subsequently conferred by the legislature, a question of great moment has recently arisen, concerning the mode in which this subsequent power may be accepted and exercised by the company. Has the legislature the right to confer such power upon the majority of the stockholders, or any number less than the whole? Can such a power be accepted by common consent?

A corporation, without the power of alienating its franchises, must necessarily receive such power as an amendment of its charter. It most certainly cannot be usurped as incidental to any other corporate power, for the obvious reason that its exercise effects the destruction of those powers and an utter extinction of the corporation itself.[5] It will follow then that such an amendment cannot be accepted by the stockholders in the exercise of any previously possessed corporate power. If accepted at all, it must be in the exercise of their individual rights as citizens of community,[6] in the same manner as the original charter was accepted. The amendment, therefore, not being within the scope of the charter, must be looked upon as a new contract with the State. Being a new franchise, not before provided for, it must be accepted on the same principle as the old ones, as we shall presently see.

When an individual becomes a stockholder in a corporation, he performs this act, not in the capacity of a corporator, for it is the act of becoming one; but as a citizen entering into an agreement. Now it is perfectly evident that he does this of his own accord. He need not become a subscriber unless he pleases. But the moment he does become such, the charter, as far as he is concerned, is accepted, and he has the rights and is subject to the responsibilities of a corporator. This being the case with every subscriber, it will follow that the charter is accepted by the individual acts of all, and not by a bare majority of the members. The acceptance of the charter being effected by the acts of the individual subscribers, it cannot be considered as an act merely of the majority, unless we suppose they could compel the minority to become subscribers. But if the majority could not accept the original charter, binding them-

[1] 1 Am. Rail. Cas. 1. [2] Ang. & Am. Corp. 158. [3] Ibid. 157.
[4] 27 Miss. 537. [5] 27 Miss. 537.
[6] Stevens v. Rutland & Burl. Rail., 1 Am. Law Reg. 154.

selves and the minority, where does it get the power to force the minority to accept an amendment?

If the franchise of conveyance is not expressed in the charter, then no stockholder in becoming such has agreed to the exercise of this power as within the scope of his contract.

He has agreed to those powers expressed in the charter, and to those incidental to their exercise and enjoyment. But he has agreed to nothing more. And the reason why the majority can exercise these powers is, as we have said before, because every subscriber in the act of becoming such has agreed to it. He has given his written consent. Where the majority attempt anything beyond these corporate powers, such as their destruction or transfer, they attempt to control the minority in something to which not a single corporator has consented in the original act of incorporation. Here the reason fails, and the rule that the majority controls the minority goes with it.[1]

If then the majority cannot bind the minority in anything except corporate acts, the power of the legislature, in this country at least, is not so transcendent as to be able to invest them with such a right. The charter is a contract, and the legislature never compelled any one to become a party to it. Where, then, except by the consent of all, does it get the power to work a fundamental change, a change which must be viewed[1] as the substitution of a new undertaking upon both sides?

And it is upon this principle alone it has been placed by recent decisions. The admitted principle in partnership and joint-stock associations, that the articles of agreement shall not be altered fundamentally except by unanimous consent, unless there is some provision in the articles to that effect, has been applied to railroads.[2] There is perhaps an implied assent of all in becoming members, that the majority may adopt such amendments as come within the scope of the charter.[3] But neither the legislature, nor the majority of the corporators, can affect the responsibility of a single member, by any fundamental change of the charter, without his consent.[4] In *New Orleans and Great Northern Rail. Co.* v. *Harris*, the court decided that the Mississippi legislature did not possess the power to authorize the majority of the stockholders of the Canton, Kosciusko, Aberdeen and Tuscumbia Co. to transfer its property and privileges to the plaintiff, and that, therefore, no rights passed by such conveyance.[5]

[1] 1 Am. Law Reg. 169.
[2] 1 Am. Law Reg. 156; 3 Ibid. 154; 12 Barb. 27; 2 Russ. & Mylne, 461; 1 N. H. 44; 13 Cond. Eq. 131
[3] 1 Am. Law Reg. 159.
[4] 1 Am. Law Reg. 168.
[5] 27 Miss. 518.

[*To be continued.*]

FRANKLIN DEXTER.

FRANKLIN DEXTER was the son of that distinguished lawyer and statesman, the late Samuel Dexter, and was born at Charlestown, near Boston, in November, 1793, and was therefore at the time of his death, in August last, nearly sixty four years old. He was graduated at Harvard College in 1812, in the same class with his professional and personal friends, Judge Sprague and Mr. C. G. Loring, each of whom has rendered, at the meeting of the bar, an eloquent tribute to his memory.

Mr. Dexter studied his profession with Judge Hubbard, and was admitted in regular course to practice at the bar of Suffolk County. He was for some years the partner of Mr. Loring; afterwards, of Judge Prescott, whose daughter he married; and still later, of Mr. W. H. Gardiner, and Mr. G. W. Phillips.

He soon took a high position at a bar, which, never without men of eminent ability, could boast, during the time of his connection with it, the names of Otis, Prescott, Jackson, Webster, Mason, and Hubbard, besides many still living whose names will at once occur to our readers. Among such rivals, Mr. Dexter took rank as a leader. Several of his competitors, undoubtedly, were more successful, that is, they had more causes on their dockets, and made a larger income by their profession; but he was one of the first to be sought in important causes, or where great legal points were to be discussed, or large interests disposed of. And this position he held, with constantly increasing reputation, until his retirement from practice in 1845.

In 1841, Mr. Dexter accepted from President Harrison the office of district attorney of the United States for the district of Massachusetts. To his conduct in office, his friend who presides over the court in which his practice necessarily lay, has borne ample and just testimony. Judge Sprague says:

"His official duties lay mostly in the court in which I presided, and I can bear witness that they were performed with consummate ability, fidelity, and discretion. Vigilant and firm in the detection and punishment of crime, it was always with that considerate calmness, which became the representative of a mild and paternal government. While he effectually repelled and exposed every effort, however

bold or artful, to turn aside the course of justice, no amount of opposition in a trial, whatever its force or character, could convert it on his part into a contest for victory or an occasion of self exhibition. He had the most exact appreciation of the duties of his station, and every qualification for their performance. Indeed, no man could come nearer to the ideal of a perfect public prosecutor."

Mr. Dexter served, at various times, as a member of one or the other house of the Legislature of Massachusetts, and in 1836, as one of a select committee, rendered valuable and important service in shaping and improving the Revised Statutes.

Like most of his brethren, who have not occupied any judicial position, Mr. Dexter has left but a slight record by which posterity can judge of his claims to professional distinction. If tradition is to be believed, he was, in the conduct of a defence, second to no one who ever practised at this bar; no sophistry could delude and no ingenuity could baffle him; his thrusts were made with unerring certainty at the weak points of the enemy's proof, and with a vigor not easily repelled.

One famous cause, in which he was engaged at an early period of his life, happens to have been well reported, and may be alluded to here. He was of counsel for the brothers Knapp, tried at Salem in 1830 for the murder of Captain White. An outline of this case is given in the published works of Mr. Webster, who was of counsel for the government, and whose speech on that occasion is one of his greatest recorded efforts, giving the reader much cause to regret that more of his arguments to juries have not been preserved. One of the accused supposed himself to have an interest in the death of the aged victim, and they both hired a ruffian by the name of Richard Crowninshield to kill him while sleeping in his own chamber. When the plot was discovered, and the parties arrested, Crowninshield, with a gallantry worthy of a better cause, hung himself in prison. As the law then stood, accessaries to murder could not be convicted without the previous conviction of a principal; and Crowninshield could not now be tried. There was some evidence, however, tending to show that Francis Knapp, who was tried first, had been present in a street, some few hundred feet from the house, while the fearful deed was done, but whether, if there, it was with the power and design to render effectual assistance to the assassin, in which case he would be liable as a principal, was quite doubtful. It

was Mr. Webster's object, of course, to uphold, and Mr. Dexter's to repel, the affirmative of this proposition. Without discussing the merits or the details of the controversy, which turned in a considerable degree upon the admission of certain declarations of the prisoner, it is sufficient to say, that upon his second trial, the first having resulted in a disagreement of the jury, Francis Knapp was convicted and eventually executed; and his brother was afterwards convicted as accessary.

The government, aided by private contributions, had retained nearly all the prominent talent of the Essex bar. Public opinion set so strongly against the prisoner, that the odium was extended to his counsel, and Mr. Dexter, as we often heard him say, with many acquaintances in Salem, found but one private house in the town open to him during the progress of the trial. Excitement was so high, that contemporaries who recall the state of feeling then existing can find no parallel to it, excepting in the recent extraordinary trial for the murder of Dr. Parkman. Mr. Webster, then in the height of his powers and of his renown, fresh from his greatest triumph in the senate of the United States, strong in the sympathy of his audience and in the substantial justice of his cause, was confident, eloquent, and somewhat overbearing. Mr. Dexter, much younger, much less famous, laboring under every disadvantage of position, conducted the defence with such skill, courage, vigor, and acumen, as to establish his reputation as an advocate worthy of any cause or any opponent.

In person Mr. Dexter was tall and graceful; his features were well cut, dark and very expressive; his smile was full of fascination. To his personal advantages he, no doubt, owed a part of the power which he always exerted in any company or position in which he was thrown. In his mind, which was clear and vigorous, were united a high imaginative faculty, and a remarkable power of analysis. By reason of the former he was naturally an artist, and he himself considered that the true bent of his genius was for painting. But the latter preponderated, and made him a severe and fastidious critic, not less of his own productions, than of those in which he had no immediate interest. If we add to this a turn of mind the reverse of sanguine, we shall readilly see, why, with talents which fitted him for the highest employments of public life, with friends eager to see those talents fully exerted and generally acknowledged, he yet never sought, and therefore

never attained, any prominent political or judicial station. For the prizes of life he had the contempt of a true artist, while he had not the ardent zeal for the special object of pursuit which often accompanies that character.

We cannot better conclude this imperfect sketch, than with some extracts from the candid and discriminating remarks of Mr. Dexter's friends, already named, and of Mr. Dana, delivered at the meetings of the bar.

Mr. Loring said:

"Of the faculties for which Mr. Dexter was distinguished, perhaps the most conspicuous, and exercising the greatest influence upon his character and life, was that of perception. It was as the lightning flash revealing the whole mental horizon in a glow of light. The true and the just, thus disclosed, exacted his homage and ready obedience; but no sophistry or defect in argument, no blemish, or violation of taste, or of principle, in art or literary composition, escaped him. It might perhaps have been happier for him if the action of this wonderful faculty could have been confined to the detection of sophistry, or weakness in argument, and the exposure of the false and meretricious in art and literature; but it was one too active and preponderating in his intellectual construction to be thus limited; and was no less prompt and effective in disclosing defects of character and the many elements of worthlessness in the ordinary prizes of life, and in the expedients resorted to for attaining them, which elude the observation of most of those who seek them, or are unheeded in the earnest struggle by which alone they can be won.

"In this power, perhaps, more than any other, lay his peculiar strength, and in its preponderance may the cause be found why that strength was not oftener and more beneficially exerted; and why his friends had occasion to lament seeming indifference to pursuits and enterprises in which his great abilities might have rendered him more eminently useful, and in which he might have found greater happiness.

"Nor was its activity expended only upon external objects, but too often was turned and with too much acuteness upon himself. No man ever judged his own performances with more critical severity; and probably no one of equal merit and efficiency ever derived less of self-satisfaction from the productions of his own mind or hand. And hence he was in a great measure cut off from those pleasurable and animating excitements of mental effort

and of the competitions in life, by which the greater number are chiefly encouraged and sustained.

"Another power, resulting from the combination of this faculty with an amply stored mind, a ready memory, and a vivid imagination, was that of easy and quick accomplishment of whatever he undertook. As any task required of him less labor of preparation than of most other men, he had neither occasion nor motive for that persistent and laborious application by which others attain to high position; by which habits are formed rendering exertions a pleasure rather than an effort; and in which is found a retreat from most of the harassing vexations and griefs of life.

"His versatility of talent was no less remarkable. He turned with equal readiness and facility to the throwing off of a literary gem or the elaboration of a profound criticism; to the composition of a picture or of a legal argument, or political debate. And in this is to be seen another source of his proneness to desultory rather than to continuous labor, and a solution of the fact that he neither sought nor attained to that prominence in public view which devotion to one pursuit can alone procure.

"Mr. Dexter was gifted with an active, delicate and comprehensive imagination, qualifying him alike for the production of the thrilling fiction, of the ghostly story, or the sublime conception and delineation upon canvas of one of the most thrilling and impressive scenes from the records of divine inspiration upon which the human mind has been permitted to dwell. But he seldom exerted this power in his forensic speeches or public addresses, although its unconscious action doubtless assisted in his clear and vivid conceptions of his subject, and of its natural illustrations. His aversion to exaggeration of all sorts, his love of truth, and disregard of personal display, and his conviction that where truth and the right are alone in issue, they stand best alone in their simple majesty, led him to abjure all fanciful decoration or illustration, and everything that might seem to imply that more than the truth was necessary for his purpose. It was, therefore, only where the end to be attained was in the regions of taste or fancy, or where it gilded the repartee, or illustrated the social discussion, that he gave it play in speech."

Judge Sprague thus described his professional characteristics.

"With almost intuitive quickness of perception, his mind was clear, acute and subtle, but he was not the vic-

tim of his own subtlety, for it was united with vigorous logic and a sound controlling judgment; and although more ready to raise doubts and difficulties than to solve them, he was a safe legal adviser. His arguments to the court were lucid, direct and terse, strongly reasoned, and with adequate but not exuberant learning. His eloquence was governed by a taste not only fastidious but severe. He had too little vanity and too much pride to do anything for display.

"Hence it was, that with a ready flow of choice language, with a memory stored not only with the learning and literature of his profession, but with the fruits of various reading, of foreign travel, and of converse from his youth with intellectual and literary society, and a strong imagination, his style of speaking was unambitious and unadorned; rarely indulging in figures or exagerations of rhetoric, or even those allusions which at once embellish and illustrate, and which he must have had at ready command. With strong passions, his addresses to the jury were not fervid or emotional; there was earnestness, but not enthusiasm; he did not throw himself with unrestrained ardor into his cause, and his eloquence therefore was oftentimes less stirring, and sometimes less effective, than it otherwise might have been. He was indeed far removed from the whole class of one-idea orators, for he never cherished a belief in his own infallibility. He did not surrender himself to the representations of one side, but looked at both; and the same keen discernment which penetrated the weak points of his adversaries, revealed to him also the infirmities of his own. Ever faithful to his cause and his client, he never for a moment forgot his higher obligations to truth and justice. He wished no success through any error or misapprehension on the part of the court or jury. His bearing was manly and elevated. From artifice and indirection he turned with disgust and contempt.

"He was particularly distinguished in the trial of patent causes and for his knowledge of the patent law. A branch of the law the most abstruse and the most difficult of application, its problems are rarely to be solved by the mere application of positive rules, but require a full comprehension of its fundamental reasons. It requires also a mastery of the principles of the invention and of the physical organization by which they are to be carried into practical effect; one must fully comprehend both the science and the art of the particular machine, as distinguished from

all others. To do this upon any occasion, with little previous scientific or mechanical training, requires a mind in an eminent degree both analytical and constructive."

Mr. Dana said:

"Younger men will naturally ask the question, whether this superiority, which is claimed for him, is well founded. Whether it is not the opinion of a few friends, influenced by the sympathies of years, of society, and of congenial pursuits and opinions. They will say, 'We are told he was a great jurist, a man of first principles, of learning and logic; but there is no book, no recorded opinion. We are told he was eloquent, but there is not one printed speech; we remember no crowded court rooms, no enthusiastic multitudes at Faneuil Hall, hanging upon his lips. He had taste and genius as an artist, we are told, but he leaves no finished picture; he put his hand to no statue, and no public building bears his impress. You say he had the mind of a statesman, yet he filled no very high office, and stamped his character on no public measures.'

"Now, sir, these questions are not only natural but reasonable; and not only are they reasonable, but they are founded on facts which all must admit to exist. The truth is, sir, in the *rôle* he played in the drama of life, the part of Hamlet was not left out. I never read the delineation of that princely gentleman, which the master painter of human nature has given us, without the reflection of the image of our friend thrown across the page — the glass of fashion and the mould of form, the observer of all observers — the courtier's, soldier's, scholar's eye, tongue, sword, and yet in that sad soliloquy, charging himself with the habit of 'reasoning too precisely on the event,' of forecasting and restrospection, until

> 'The native hue of resolution
> Is sicklied o'er with the pale cast of thought;
> And enterprises of great pith and moment,
> With this regard, their currents turn awry,
> And lose the name of action.'

"If there is no claim on the memories of men unless established by books, or monuments of works accomplished, on which the workman may put the *facit*, and not the *faciebat*, the friends of Mr. Dexter might well despair of justice being done him by the advancing generation. But this view is not just, not reasonable. Reputation may be established by the consenting testimony of men. It may rest on tradition as held *semper, ubique, et ab omnibus.* If this emi-

nence of Mr. Dexter were claimed by a few, by a circle, by persons peculiarly situated, it might be distrusted. But this is not so. The concurrent testimony to his peculiar powers come from all points of view; from those who saw him from above, and those who saw him from below, and from his contemporaries by his side. Those who have held judicial office, and hold it now with honor, tell us he was a true jurist. Those who met him in the contests of the forum, testify that he was a formidable antagonist. Those who have labored with him as associates, gratefully recall his sound judgment, his discernment of first principles, his patience of labor, and of details even, when they were connected with first principles, and his courage and fidelity in their indication. Politicians, friendly or hostile, who have reached high office, admit that he had many claims superior to their own; and the general public always looked to him for high service, and left open for him posts of honor, as if they were his right. Artists tell us of his taste and genius in the calling of their lives. The society of professional artists in Boston, though he was but an amateur, looked to him as their head and adviser."

"The resolutions say, and you have said, that he was a gentleman. He was, indeed, that. The fineness of tone, which is the essence of the character, was his. But fineness of tone only leaves that character *in posse*, and not *in esse*. He had that innate grace of manner and chivalry of temper, which gives to that character form and development. When we recall his presence, we feel that we need not be referred back to traditions of Sidney or Bayard, or to the memories of our own Hamilton, for the image of the knightly gentleman."

District Court of the United States for the District of Massachusetts. June, 1857.

NICHOLS *v.* TREMLETT.

The charterer of a vessel agreed to load a full cargo of coal at P., "to be received as customary," lay days to be "as customary in loading," and daily demurrage was agreed upon for any time the vessel might be longer detained. The owner agreed that the vessel should proceed at once to P. It was the custom at P. for vessels to take their turn in loading according to the order in which they arrived. All the coal was owned by a company who usually supplied seven hundred chaldrons per day. The number of vessels in port when this vessel arrived was large, and the supply of coals was small, so that cargoes could not be obtained as rapidly as was usual.

Held, that the customary lay days mentioned in the charter-party, did not mean the number of days that vessels are usually detained at P., but the number that this vessel would have been detained, considering the vessels which had prior rights to load, if there had been a supply of coal as great as usual. Also, that if there were deviation and delay on the part of the master, by reason of which the vessel arrived at P. several days later than if she had prosecuted the voyage directly, demurrage was to be given for only such delay as would have arisen had she arrrived in due season.

SPRAGUE, J. — This is a libel for demurrage. On the 8th day of August, 1854, the respondent, a merchant of Boston, and the libellant, master of the brig Melazzo, executed a charter-party, by which that vessel was to go to Pictou, and there take a cargo of coal and convey it to New York. The respondent was to be allowed at Pictou lay days as "customary in loading," and "the cargo was to be received as customary," and in case the vessel was longer detained, the respondent agreed to pay to the libellant demurrage at the rate of thirty Spanish milled dollars, day by day, for every day so detained, provided such detention should happen by his default or that of his agent.

The vessel arrived at Pictou on the sixth day of September, and was there detained until the third day of November. It is alleged by the libellant, that this detention far exceeded the customary lay days, and for the excess he now claims demurrage at the rate of thirty dollars a day. It appears by the evidence that there is no custom by which a vessel is to have a particular number of days for loading at Pictou. And the first question is, what is the meaning of the expression in the charter-party, lay days as customary for loading? It is contended by the libellants, that it means such number of days as vessels had theretofore been generally detained for cargoes, and in loading,

and that this did not exceed from six to twelve. But upon the proofs I cannot adopt this construction. It appears that coal is the only article exported from Pictou. That the mines are worked by a company, and that it has been their practice to carry on their mining operations throughout the year; the coals raised in the winter, when the harbor is not accessible to vessels, being deposited on the bank to aid in meeting the demand of the summer and autumn. There are seven berths at which vessels are loaded, all about three miles distant from the mines. It has been the practice of the company to send the coals to the vessels daily, and to supply the demand up to 700 chaldrons a day. By the established custom of the port, vessels take their turns in going to the berths, and loading in the order of time in which they pass the light in entering the harbor. In the latter part of the summer, and during the autumn of 1854, there was a deficiency in the supply of coal by the company, owing partly to a diminution in the quantity deposited on the bank during the preceding winter, and partly to the great number of vessels seeking coal during that season. When this brig passed the light there were a great number of vessels who had preceded her waiting for cargoes, and her extraordinary detention was owing to her being compelled to wait until these had been loaded, and to there being a deficiency of coal. It is contended by the respondent, that the detention in this case was occasioned solely by the custom which compelled this vessel to wait her turn, and that he is in no way responsible for the delay occasioned by the want of coal for those that preceded her. By the terms of the charter-party, the shipper was bound to furnish a cargo, and I think that by the true construction of that instrument, the shipper was entitled to such number of lay days as would be necessary to complete the loading of this vessel, she taking her turn according to the custom, and coal being supplied after her arrival at the rate of 700 chaldrons a day, in conformity with the previous practice of the company. Such I think must have been the customary lay days contemplated by the parties, and if there was longer detention for want of the usual supply of coal to the extent of 700 chaldrons a day, the shipper is responsible therefor at the rate stipulated in the charter party. The respondent presents another ground of defence which deserves consideration. He alleges that this vessel ought to have proceeded directly and without delay from Boston to Pictou, but that she deviated and

remained a long time in her home port in Maine, thereby postponing her arrival at Pictou, and that if she had reached there as early as she might and ought to have done, there would have been a less number of vessels to take precedence of her, and a greater daily supply of coal, and that the great detention to which she was subjected after her actual arrival was therefore owing to her own fault.

In the charter-party, the vessel is stated to be lying in the harbor of Boston. It appears by the evidence that she was in fact at Searsport in Maine, undergoing repairs, and was detained for that purpose some twelve days. The vessel being represented in the charter-party to be then in Boston, the respondent had a right to expect that she would proceed from that port to Pictou without any unreasonable and unusual delay, and if she did not do so, it was a violation of her duty under the contract. From the evidence it appears that if the vessel had been in Boston, and had sailed for Pictou, and prosecuted her voyage in the time and manner that it is usual and reasonable for such vessels to do, she would have arrived at Pictou on the 19th of August, and the respondent is entitled to be placed in as good a condition as he would have been if she had performed her duty and arrived at that time, and the libellant is not entitled to recover for any detention occasioned by his own fault. It is insisted on behalf of the respondent, that there having been this deviation and delay by the libellant, he can have no claim whatever for demurrage, because it is impossible to ascertain whether there would have been any, or if any, how much detention beyond the rightful lay days, if the libellant had used due diligence and arrived in the proper time, but this I think is answered by the evidence which is unusually full and precise. Records were kept by the company of the arrival and loading of every vessel, and of the quantity of coal furnished each day during the season, and it satisfactorily appears that if this vessel had arrived on the 19th of August, and there had been a supply of coal up to 700 chaldrons a day, she would have been loaded on the fourteenth day of September, taking her turn according to custom, but that with the supply that was actually furnished per day, she would not have been loaded until the second day of October, and thus there would have been a detention of eighteen days for the want of the usual supply of coal, and for this the shipper must have been responsible, even if the libellant had arrived in due season, and to that extent the delay

does not arise from the fault of the libellant. To illustrate this, suppose that at the time this vessel did actually arrive there had been the same vessels in port having precedence, and the same daily supply of coal as there were on the 19th of August, and from that time to the 2d of October, then her detention from her arrival on the sixth day of September, would have been precisely the same as it would have been had she arrived on the 19th of August, and thus no part of her detention would have been owing to the fault of the libellant, and the respondent would in this respect have suffered nothing from his deviation. I am of opinion, therefore, that the libellant is entitled to recover for eighteen days at the rate of thirty dollars per day.

J. C. Dodge, for the libellant.

R. H. Dana, Jr., for the respondent.

Motion to stay judgment or execution.

Sprague, J. — This is a motion to stay further proceedings until a hearing can be had in a cross libel by *Tremlett* v. *Nichols*, upon the same charter-party. Before the hearing a motion for a postponement was made, founded on the pendency of the cross libel. But as evidence had been taken at great labor and expense, and the case was then ripe for hearing, and involved the same transactions upon which the second suit was mainly founded, the court ordered the hearing to proceed with permission to the respondent to renew his motion for delay at a future stage of the cause. That motion is now renewed. Several questions have arisen. The first relates to the service of process. Ever since the filing of the cross libel Nichols has been out of the jurisdiction, and no personal service on him has been made, but notice has been given to his proctor in the first suit. This is not sufficient service.

The libel by *Tremlett* v. *Nichols* is not merely defensive. It is not like a cross bill in equity, or a bill to enjoin a judgment whose whole force is exhausted in repelling the claim of the other party. But it proceeds further, and claims damages upon an independent stipulation, and to a greater amount than may be decreed to the other party in the first libel. The proctor of Nichols cannot, therefore, by virtue of his retainer in the first suit, be deemed his agent to receive notice in the second. But although no service has been made upon Nichols so as to authorize the court to proceed upon his default or contumacy, yet the

court may in its discretion stay proceedings in the first suit, until an appearance shall be entered and others steps taken in the second. Nichols has voluntarily come within the jurisdiction to litigate upon this charter-party with Tremlett. The latter insists that he has a claim upon the same contract exceeding any rightful claim of the former. Upon an adjustment of the whole voyage nothing may be due to Nichols, and yet if the court has no power to stay proceedings, he may coerce Tremlett to pay a large sum by a decree of this court, and leave him to seek his remedy on the same contract in another and perhaps a foreign and remote jurisdiction.

But it is insisted that the present is not a proper case for the exercise of this power. The first objection is, that the cross libel does not present even a *primâ facie* case, and that it is apparent that it cannot be maintained. The principal ground of claim set forth in the cross libel is, that there was a wrongful deviation and delay in going to and remaining at Searsport, which caused her late arrival at Pictou, and postponed her arrival at New York, by which the shipper lost the benefit of a contract for the sale of the coal, and by the depreciation of the market value, so that he was obliged to sell at much less price than he would have obtained if the brig had arrived in due time. This is the same deviation and delay at Searsport which is set forth in the suplemental answer, and has been already considered in the original suit. It is objected that the shipper cannot maintain a new suit for the same default. This objection cannot prevail. It was set up in the answer merely to repel the claim of the libellant. That suit was for demurrage at Pictou, and in order to sustain it, it was necessary for the libellant to show a detention there by the fault of the respondent. The answer insisted that the detention at Pictou was caused by the previous wrongful deviation and delay by the libellant, and not through any fault of the respondent. This was the view presented by the answer, and the only extent to which it was considered by the court. The cross libel now presents a distinct and independent claim for damages occasioned by that misconduct on the part of the ship-owner, alleging that the voyage was thereby retarded and the arrival of the vessel at New York postponed, so that he lost the market for his cargo. This claim the respondent did not present in answer to the former suit. It may be contended that he might and ought to have set it up in defence of the first

suit, and that he cannot now make it the ground of a new action. I think that he might have availed himself of it in his answer to the first suit, although this doctrine has been seriously doubted. The admiralty does not take cognizance of pleas, in set-off, no statute having giving it that authority, and it has been thought by some that a distinct claim by the respondent, founded upon the violation of the contract by the libellant, is in the nature of a set-off, and so not cognizable by this court. But I am of opinion that where the counter claim is founded upon the same charter-party, the respondent may set it up in his answer, so that the damages that he has sustained may be recouped from the amount which the libellant might recover. But in such case if the damages sustained by the respondent should exceed the just claim of the libellant, the court can give no decree for such excess. The utmost effect being to diminish or extinguish the claim of the libellant. Nor could the respondent afterwards maintain a suit for such excess. He cannot be permitted to split up his demand, and litigate the same question twice. Having once voluntarily submitted his claim for damages to the court, he must be content with such relief as the tribunal may afford him. But although the respondent may set up such claim in his answer to the first suit, yet he is not bound to do so, but may have a separate action therefor, and recover any amount of damages he may have sustained. Similar questions have heretofore come before this court in suits for freight which may exhibit the principles applicable to the present case. To a libel for freight, the respondent may answer that some of the goods were lost by the misconduct of the carrier, and never delivered to the consignee, and that the libellant is not entitled to freight for those goods. Here, although there is an allegation of violation of duty on the part of the carrier, yet it leads only to the other allegation of the non-delivery, and is used merely to defeat the claim of the libellant by showing that it is unfounded. No damages for the misconduct of the carrier are claimed. The respondent in such case by his answer might go further and claim compensation for the property lost, and that the value thereof should be deducted from the freight to which the libellant was entitled for that part of the cargo which he had duly delivered.

In some of the cases which have come before me, the whole freight was earned, all the packages having been delivered, but the respondent was permitted to set up and

sustain a claim for damage or deterioration of the goods, by the fault of the carrier, and the amount was deducted from the freight earned and sued for.

In the case now before the court, the shipper in his cross libel insists that the ship-owner violated his contract, by not proceeding directly and with reasonable diligence to Pictou, by reason whereof the vessel did not arrive at her ultimate port in due season, and he was greatly damnified thereby. This claim not having been presented or litigated in the first suit, he is not precluded from pursuing it by a new libel.

It is further objected, that there has been a want of due diligence in instituting the cross suit, which should preclude the respondent from having further delay. The voyage terminated in the latter part of December, 1854. The first libel was filed in February, 1855, and the answer in March following. The cross libel was not filed until December, 1856. This is a great delay. But it does not appear that the respondent had knowledge of the deviation and stay at Searsport, prior to December, 1856. It is true, that in his original answer he states that there was deviation and delay in reaching Pictou, but he states no specific facts, and it may have been mere inference from the date of her arrival. But all the facts were known to the libellant Nichols, and instead of stating them truly, as he ought to have done, in his libel, it is therein positively alleged that the vessel at the time of making the charter-party, was riding in the harbor of Boston, and that she "departed from said Boston with all possible dispatch for said Pictou," when in truth she was at Searsport, and there remained a long time, undergoing repairs. This positive assertion which was not retracted until after the cross libel was filed, may well have misled the respondent, and prevented his instituting inquiry, and it is not for the libellant to say that he ought earlier to have ascertained that these assertions were false.

I shall order a stay of proceedings for the present, but not until any particular time or event. Perhaps an appearance will be entered, and such stipulations given as will render it proper for the court to proceed to a decree and execution before a hearing in the cross libel.

Proceedings stayed until the further order of court.

Conkling's Treatise, pp. 89, 90, 91, and authorities there cited; *Dunn* v. *Clark*, 8 Peters, 1.

District Court of the United States for the District of Massachusetts. August, 1857.

THE STEAMER LE VOYAGEUR DE LA MER.

Admiralty practice. In what cases the court will order the libellant to produce a document for the inspection of the respondent before filing his answer.

THIS was a suit *in rem* on a contract. The libel did not set forth or allude to any writing as containing the contract. The claimants of the vessel before filing their answer to the libel, moved that the libellants be ordered to produce for their inspection a certain letter written by the claimants' agent to the libellants. This motion was in writing, and accompanied by an affidavit, setting forth that the contract on which the libellants rely was never reduced to writing in a separate instrument, but was to be ascertained, among other sources, by a correspondence between the libellants and the agent of the claimants, that one letter of this correspondence was essential to the full understanding of the contract, and that this letter was in the libellants' custody, that the claimants had no copy of it, and no means of ascertaining its contents, and that they could not fully and truly answer the allegations of the libel without an inspection of the better.

The motion was resisted by the libellants' counsel.

SPRAGUE J. — The researches of the counsel on both sides have found no precedent or decision in an admiralty court in this country, or in England, directly upon this point. It seems to be, at least as disclosed by the books, a novel motion in the admiralty. We must look at the analogous cases in courts that proceed according to the course of the civil law, and to common law courts, especially the former, for light as to the principles upon which the decision should rest.

It is familiar practice in admiralty for either party, after issue joined, to interrogate the other for the purpose of obtaining evidence to be used by the interrogant. In equity, the same relief is obtained by interrogatories on the plaintiff's part, and by a bill of discovery. But this is a motion not for evidence after issue, but for documents alleged to be necessary to enable the parties to make up an issue.

On this point, one principle is admitted by the claimants' counsel, and may be considered as settled. This is

that the general rule does not entitle a party to the production of an instrument before issue joined, where the instrument is not referred to or counted upon in the plaintiffs' pleading. But it is contended that there are circumstances under which the courts exercise the power, and where justice requires its exercise. After examining the authorities referred to on each side, I have arrived at the conclusion that there is but one class of cases in which the courts ordinarily exercise this power. That class of cases is where the plaintiff is under an obligation to hold the instrument for the use of both parties. For instance, partnership articles or books, in a suit between partners, or where but one part of a bipartite agreement has been executed, and has been left with one of the parties; in short, where an instrument may be said to be left or held in trust. In such case, if it is the contract in litigation, it should be produced for inspection, whether declared on by the plaintiff in terms or not. As an authority for a more extended exercise of this power, I am referred to *The Princess of Wales* v. *The Earl of Liverpool*, Swanst., decided by Lord Eldon. This authority, though followed by the Vice Chancellor in one case, *Jones* v. *Lewis*, 2 Sim. & St., has since been called in question, and held by Vice Chancellor Leach to be authority only on its exact facts. The defendant there asked for inspection of a note of hand, making affidavit that he believed it not to be genuine, and that an inspection would aid him in determining upon the nature of his answer. In New York, the courts of common law have passed orders for inspection, in favor of parties before pleadings closed, upon the authority of the *Princess of Wales* v. *Lord Liverpool*, and have extended the principle to cases where by accident, fraud or mistake, one party has a document which the applicant shows to be important to enable him to make his plea; but I think they have not kept within the reason or authority of the adjudged cases.

It is argued that this letter, being a part of the correspondence which constitutes the written contract, is the property of both parties, and is as much a trust for both parties as if it were a formal written contract. I am inclined to accede to this view. If it were made to appear that the whole contract was in writing, and that this letter contained the whole contract, I should grant the motion. So, if the whole contract was in writing, and this letter was a part of the writing, I should be inclined to grant the

motion, provided it appeared that the rest of the contract was either produced or within the control of parties, and that there was no dispute as to what writings existed and were to be produced. But, in this case, it does not appear that the whole contract is in writing. On the contrary it is said to be partly in writing. The nature of the contract may be left to be proved partly by parol, and even by circumstantial evidence. In such a case, I think there is no authority for requiring the production of a paper. It would be giving the defendants an advantage. They would learn the extent of the knowledge or ignorance of the other side as to the proofs of the contract; and, without first answering as to their best knowledge and belief, could frame their answers to meet the disclosures on one particular point. In a case of a writing forming only a part of a contract, the court must have discretion as to requiring the production of a paper or letter; and in the present case, I do not think I ought to grant the motion as it now stands. It presents the case of a contract declared on generally, to be proved partly by a correspondence and partly by parol, perhaps inferentially from circumstantial evidence, and open to counter proof, and a portion only of the correspondence called for.

J. W. Hubbard and *C. Houghton*, for the libellants.

R. H. Dana, Jr., for the claimants.

Superior Court of Suffolk County, Massachusetts. March Term, 1857.

Before the full bench. Reported by L. H. Boutell, Esq.

Bank of Orleans *v.* Francis H. Whittemore et al.

Where the maker of a note, which was dated and delivered to the payee, at Boston, resided in another State when the note was made, and when it matured, an indorsee, who receives the note with a knowledge of these facts, and in time to demand payment of the maker at its maturity, cannot maintain an action against the indorser without such demand.

The facts of the case appear in the opinion of the court, which was delivered by

Abbott, J. — This is an action of contract against the defendants as indorsers of a promissory note for $1000, given by one Moore to the Commercial Mutual Insurance

Co., payable in one year, indorsed by the Insurance Co. to the defendants, and by the defendants to the plaintiffs. The note was dated in Boston, and delivered to the payees in the same place. The agreed facts show that the promissor Moore, at the time of making the note and when it became due, resided, and had his only place of business in Newbern, North Carolina, and that this fact was known to the plaintiffs when they took it long before it became due, and in season to send it to Newbern to demand payment of it of the promissor. It is further agreed that before the note became due, the plaintiffs, a banking corporation in Vermont, sent the note to their agent in Boston for collection, who called on the defendants to have them waive a demand, but that they refused so to do, and told the agent to send it to Newbern, and have it demanded of the maker, and that the agent thereupon sent it to a bank in Newbern for collection in season for a demand, but that the cashier of the bank to which it was sent, for some reason neglected to make a demand on the maker, and returned the note to the plaintiffs' agent in Boston, who received it on the 5th of May, 1856, the last day of grace on it being the day before, May 4th, which was Sunday. On the same day he received the note, the agent notified the defendants that it had been returned unpaid, and demanded it of them, and also caused it to be sent to Newbern again to be protested, which was done in the due course of mail without unnecessary delay.

Upon these facts the plaintiffs contend the defendants are liable, and put their claim upon two grounds, which they maintain to be law, either of which would be sufficient to sustain this action. First, that a holder of a note has a right to retain it the whole of the day it becomes payable, waiting for the maker to come to him to pay it, and then has a reasonable time after the expiration of that day to send to the place of residence of the maker to demand it, and notify the indorsers of such demand. Secondly, where the maker of a note lives out of the State, and has no place of business in it, and the note is dated and delivered within the State, although not made payable at any particular place, that under such circumstances no demand upon the maker is required in order to charge an indorser.

We think neither of these claims can be sustained, and that an examination of the principles of the law regulating commercial negotiable paper, will show beyond all ques-

tion their fallacy. What is the contract of the indorser? Simply this, that if the note is demanded of the maker on the day it becomes payable and is not paid, and he is seasonably notified of such demand and refusal, he will pay it. This is the contract generally, although there are, of course, cases where such demand may be excused, which are, however, but exceptions to the general rule. The first proposition does not fall within any of the exceptions, and if it can be sustained, will work an entire change in the law regulating the contract of an indorser, so that instead of being necessary, hereafter, to demand payment of the maker in order to charge an indorser on the last day of grace, it will be only necessary to use due diligence to make such demand as soon as is reasonably possible after the expiration of that day. The claim is based upon the ground that the maker has the whole day to pay the note, that it is his duty to seek the holder, and not the holder's to find the maker, and that the former has a right to wait the whole of that day for the latter to come to him and pay it. If this reasoning is sound, of course, in no case would it be necessary to demand payment of the note until the expiration of the last day of grace. But this seems to us to be strangely confounding the situation and liabilities of maker and indorser, and entirely disregarding the difference between them. It is true, that as far as the maker is concerned, there is no duty on the part of the holder, either to demand on the last day of grace, or at any other time; but when the indorser is attempted to be holden, then the holder must demand the note on the day it becomes payable, not for the purpose of affecting in any way the duties or rights of the maker, but simply to do that act upon the performance of which as a condition precedent rests the liability of the indorser. It is said there are cases where, from the necessity of the case, the demand cannot be completed until after the last day of grace, as where there are two makers, not partners, who live so far apart that it is impossible to make the demand on both on the same day, and also, where a note is indorsed to a holder at such a distance from the maker and at so short a time before its maturity, that no demand can be made. This undoubtedly is true in the cases put, and under such circumstances the law would not require that to be done, which was impossible by the exercise of ordinary diligence, and which the indorser knew was impossible. In such cases, it would be undoubtedly holden that by the act of indorsing there was

a waiver of strict compliance with the general rule of law, and that all the indorser contracted for was that a demand should be completed as soon as it could be done by the exercise of ordinary diligence.

We are aware that there are two cases in our own Reports, and one in New Hampshire, where a different rule is enacted. *Freeman* v. *Boynton*, 7 Mass. 483; *Barker* v. *Parker*, 6 Pick. 80; *Hadduck* v. *Murray*, 1 N. H. 140. Of course we are bound, as a matter of authority, by whatever has been decided by our own supreme court, in any case before them, but not by any mere enunciation of opinion upon matters not necessary to be passed upon in deciding the case under consideration. Was the rule otherwise, and were all the dicta of courts in the reports upon questions, not necessary to be passed upon and decided to be taken as authority, we should have a mass of bad logic and inconclusive reasoning, which would go far to overwhelm the law in a wreck of confusion worse confounded, and beyond possibility of extrication. In the two cases cited from our own reports, it was not necessary to make any such enunciation of doctrine as is there made to decide the cases; indeed in both of them the adjudication was made on different grounds, the first that even under the rule as claimed there was no sufficient demand, and the second upon the proof of a waiver of demand by the indorsee. Although, of course, we receive any expression of the learned judge who gave the opinion in those cases with the greatest respect, we are not bound by it as authority, more especially as it is not supported by the citation of a single authority. The case in New Hampshire cannot be disposed of in the same way; it is exactly in point, but of no further authority here than as the expression of the opinion of a highly respectable tribunal, which may commend itself to the judgment of our courts as a true exposition of the law. The learned judge who delivers the opinion certainly states very boldly that the rule is settled by authority to be as he states it, and makes several citations in support of his assertion. As a matter of curiosity we have examined the cases cited, and find that in each, with the exception of the case of *Freeman* v. *Boynton*, the demand was regularly made on the maker on the last day of grace, and the whole question was in reference to the time within which notice should be given to the indorser of such demand, so that in fact the opinion is not sustained by one of the authorities cited. These

are the only cases which distinctly affirm the doctrine claimed, while on the contrary the latest text books deny the authority of those cases, and claim the law to be that the demand on the maker must be made on the day the note becomes due, if it can be done by the exercise of due diligence. Bayley on Bills, sect. 232; Story on Notes, sect. 265, n. 2; Chitty on Bills, 354. So are also the New York cases, *Jackson* v. *Richards*, 2 Caines, 343; *Griffin* v. *Goff*, 12 John. 423; *Johnson* v. *Haight*, 13 John. 470. Nor can any English case of received authority be found where it is not holden that the holder must exercise due diligence to make the demand on the day the note becomes payable, where a demand at any time is required. It is believed also, that the almost universal and well established practice of the commercial and business community conforms to, and sustains such a rule. Notwithstanding then the *dicta* in the two cases referred to in our own courts and the decision in New Hampshire, we are satisfied that it is not now, nor ever has been the law, that where the maker of a note did not live in the same town with the holder, it was not necessary to present and demand payment on the day it became payable in order to charge the indorser, but that it might be done within a seasonable time thereafter; on the contrary, we believe the law always to have required that whenever any demand on the maker is necessary, the holder must use due diligence to make that demand on the day the note is payable, and not after its expiration. By deciding that in all cases where any demand on the maker is necessary, due diligence must be used to make such demand on a day certain, namely, the day the note becomes payable, we have a certain, well defined, and easily understood rule of action; while the doctrine contended for by the plaintiff would, instead thereof, establish that most glorious uncertainty, where no one can tell beforehand the law by which he is to regulate his conduct; an uncertainty which all well regulated systems of jurisprudence seek to avoid, though unfortunately too often without success.

The further question remains,— Is it necessary in order to charge the indorser to make any demand on the maker, who at the time of the making and maturity of the note continued to reside in another State, the holder knowing that fact and taking the note in season to make the demand? This question has not been decided in this State, though we think a conclusion can be easily arrived at by a reference to the well established principles governing negotiable

paper. As we have before seen, the general rule defines the obligation of the indorser to be an agreement to pay the note, provided the holder either demands it, or uses due diligence to demand it of the maker when it becomes due, except in certain excepted cases, and gives notice of such demand to the indorsee. Whenever, then, the maker lives in a different State from the holder at the inception of the contract, and this fact is known, the note is taken, as far as the indorser is concerned, upon the understanding that a demand must be made. There is no hardship in such a requirement, because if such was not intended to be the contract, then the note should have been made payable at a place certain, and if the holder takes it without being made so payable, knowing where the maker resided when made, he makes the contract with a full understanding of what is required of him, and cannot complain of the hardness of the obligation which he voluntarily assumes. We believe this to be the well settled practice among business and commercial men in this community, and that the constantly increasing intercourse between the people of different States requires that the rule should he adhered to. Both principle and authority concur in the support of this requirement. Bayley on Bills, 231; Chitty on Bills, 354; Story on Notes, § 262; *Taylor* v. *Snyder*, 3 Denio, 145; *Spies* v. *Gilmore*, 1 Comstock, 351. No English case of established authority can be found to sustain a contrary doctrine. In this country the rule is different, indeed in one of the States. *Hepburn* v. *Toledun*, 10 Martin, 643. The cases cited, however, *Prior* v. *Genty*, 10 Georgia R. 300; *Shutler* v. *Piatt*, 12 Wils. R. 417, and *Gillespie* v. *Hemnaham*, 4 McCord, 503, are not in point, and do not sustain the claim made by the plaintiff. We think the rule should only be extended to the case where the maker has removed from the State since the making of the note, as then it may well be claimed that the indorser contracted upon the ground that the demand was to be made in the State, and the obligation of the holder cannot be altered by the act of the maker without any fault of his. In this State the court intimate that when the indorsement is made after the removal of the maker to another State, which fact is known to the holder, a demand must be made on the maker, although when he gave the note he was a resident here. *Wheeler* v. *Field*, 6 Met. 290. If such is the law, for a still stronger reason must the demand be made on the maker, when he is known

to the holder never to have had a residence within the State, and when by the exercise of due diligence a demand on him could be made. We think also in reference to the law applicable to negotiable paper, in the absence of any express decision of our own courts, a case directly in point passed upon by the courts of New York, should be of great and controlling weight and authority. The result to which we have come from an examination of the principles and authorities applicable to the case at bar, is this, that as the maker of the note was not a resident of this State when it was made, or became due, which fact was known to the plaintiffs when they took it, and as it was possible for them by the exercise of due diligence to have demanded payment of the maker the day it became payable, and they neglected so to do, they cannot under such a state of facts recover against the defendants who are indorsers.

Hutchins and *Wheeler*, for plaintiff.

H. Jewell, for defendant.

Recent Cases in New Hampshire.

Supreme Judicial Court.

June Term, 1857. *Rockingham.*

Burnham, *Adm'r v.* Ayre.

Alteration of instruments — Receipt — Evidence.

In the absence of evidence or circumstances from which an inference can be drawn as to the time when it was made, every alteration of an instrument will be presumed to have been made after its execution.

A material alteration, without the consent of the party to be affected by it, renders the instrument void as to him. An immaterial alteration, which does not vary the meaning of an instrument, does not avoid it, though made by the party claiming under it. Whether the alteration is material or immaterial, is a question of law for the court; and it is error to leave that question to the jury.

Where the law would supply the alteration, or it is made in an

immaterial portion of the instrument, the alteration is immaterial. A receipt, so far as it is evidence of payment, is open to explanation and contradiction by any competent evidence.

Where the holder of a mortgage of real estate had given to the mortgagor a receipt in full of all demands, and the mortgagor subsequently took a deed of the mortgaged premises written by himself, wherein the mortgage was recognized as a subsisting incumbrance upon the land: —

Held, in a suit to foreclose the mortgage, that this deed was admissible in evidence, as tending to show an admission by the defendant that the mortgage was in force, and the mortgage debt unpaid, at the date of it, and not intended to be embraced or discharged by the receipt.

June Term, 1857. *Hillsborough.*

GROVES *v.* SHATTUCK.

Nuisance in highways — Shade trees.

The jury must determine, from all the circumstances of each particular case, whether an object permanently placed, temporarily left, or slowly moving in a public highway, is or is not a nuisance; and this determination must depend on their finding, whether or not the giving object, under all the circumstances attending its occupancy of the highway, necessarily obstructed the free passage of the public over and upon it.

Highways may lawfully and properly be used for purposes other than the accommodation of the public travel, provided such use be not inconsistent with the reasonably free passage of the public over them. They are designed and constructed for general convenience, and may be used as they have ordinarily been accustomed to be, without nuisance. Time and necessity, as well as locality, are important elements in determining the character of any particular use of a highway.

Where highways have been commonly used for moving buildings through them, it is no nuisance to employ them for that purpose, selecting suitable ways, using proper expedition, and causing no unnecessary obstruction; and the reasonableness of such use, under all its circumstances is a question for the jury. If one assume that a building which is being moved through a public highway is a nuisance, and undertake to abate it as such, he does so at the risk of being deemed a trespasser if he fail to establish the existence of the nuisance, or employ unnecessary force or unwarrantable means for its removal.

If the private property of an individual is imperiled by a moving building, he has a right to use whatever force is necessary to defend and protect that property from injury; but a mere prospect

of injury, will not justify the destruction of the building, unless it be a common nuisance; and where there is time and opportunity for the interposition of an adequate remedy by legal process which may be effectual, the law will not justify a summary resort to force.

The law of the road has no application to buildings that are being moved over and through public highways.

Towns are not bound to grade the whole width of common highways; in cities and villages, foot passengers may properly be accommodated and protected by side-walks, curb-stones, posts, and railings, to the exclusion of carriages from a portion of the way; adjoining land-owners may lawfully use the space between the carriage path and such side-walks, for the growth of trees for ornament or utility, and trees thus situated are in no sense nuisances, but specially protected by statute; and if they are injured or unreasonably endangered by a building that is being moved through the highway where they are, their owners are justified in employing sufficient force to defend and protect them from actual or immediately impending injury.

Ela and Wife v. McConihe.

Partition of real estate — Waiver.

The neglect of the petitioner in a petition for partition, pending in the probate court, to make any question about the title until after the appointment of the committee to make the partition, is a waiver of such question; and it is then too late to dispute the title set forth in the petition so as to oust the probate court of jurisdiction.

By the provisions of chapter 206 of the Revised Statutes, the committee appointed to make partition are to be sworn before proceeding to a hearing of the parties, in the case of proceedings pending in the probate court, as well as in the supreme court. If not so sworn, the report of the committee will be set aside and a new committee appointed.

Kidder v. Barr.

Cross bill in equity — Parol contract for conveyance of land.

The answer to a cross bill, filed for discovery in aid of the defence, cannot be used by the party making it, unless the complainant in the cross bill shall first produce it in evidence. Upon motion of the party filing such cross bill, made after answer, which he does not choose to use as evidence, the bill may be dismissed. The specific performance of a parol agreement for the conveyance of land may be decreed in equity, unless prevented by the statute of frauds.

The death of either of the parties to such a contract does not

impair its obligation, and it may be enforced against the heirs and legal representatives.

A part performance of a parol agreement for the sale and conveyance of land will take it out of the statute. Payment of the purchase money alone is not such part performance. Possession by the vendee and improvements upon the land, made by him by the consent of the vendor, is part performance.

The defendants' testate, one W., let the complainant have a sum of money, and, at the same time, took from him an absolute deed of land, and made a parol agreement that he would reconvey the land upon the payment of the money and interest. The complainant subsequently paid the money and interest, and was thereupon let into possession by W. He erected buildings upon the land, received the rents for the same, and paid the taxes for a series of years until W.'s decease.

Held, that a bill could be maintained for a specific performance of the contract.

June Term, 1857. *Merrimack.*

Jewell *v.* Warner.

Estates tail.

The statute *De Donis* was impliedly repealed, and estates tail abolished in New Hampshire by the statutes of 1789.

Quimby *v.* Melvin.

Bond to refer — Breach of condition.

A bond that a party "will in good faith abide by and fulfil his agreement in having and perfecting a reference," is broken, if the party prevent one of the referees from attending the hearing, though only the costs should remain undecided.

Hopkinton *v.* Winship.

Laying out of highways.

Upon the presentation of a petition for a highway in two or more towns, the court will not, prior to the reference of the petition to the commissioners, inquire into the fact whether the petition is not in truth for a road in one town alone, and thus an evasion of the statute requiring such petitions to be first presented to the selectmen. Such fact is a question for the decision of the commissioners, and if made to appear by their report, it will be fatal to the proceedings.

Upon a petition for a new highway, selectmen and road commissioners may lay out a road in part new and in part over and upon an existing highway. The report of commissioners laying out a highway over a road that had previously been discontinued,

need not state any change of circumstances as having occurred after the discontinuance.

In deciding whether the public good requires that a highway be laid out, it is proper that individual advantages going to make up the public good should be considered by the commissioners.

June Term, 1857. *Strafford.*

WEED *v.* BARKER.

Mortgage — Future advances.

If the parties to a mortgage reside out of the county where the land lies, and after they have agreed on the loan and mortgage, they, being at the time in that county, for convenience have the deed executed, delivered, and recorded, and within a short and reasonable time afterwards, the note and loan are made at the place where they reside, pursuant to the agreement, in the absence of fraud the mortgage is valid against a subsequent mortgagee, and not within the statute of New Hampshire, which prohibits mortgages of land to secure future advances.

In such case the mortgage and loan are to be regarded as parts of the same transaction, and the mortgage does not take effect as a security till the loan is made pursuant to the agreement.

CURRIER *v.* BOSTON AND MAINE RAILROAD CO.

Evidence.

To render the declarations of a party evidence in his own favor as part of the *res gestæ*, the act to which the declarations relate must be material as evidence in support of the matter in controversy, and not merely material as constituting the foundation of the claim set up in the suit.

Where the point in controversy was, whether the line established for a railroad had been changed by the corporation after they had contracted with the plaintiff to grade it, an offer to prove how the road was to be graded, stated in those terms, was properly rejected, it not appearing that the evidence offered would tend to show where it was to be done. What "hard pan" is, and whether any was found in excavating, are not questions relating to a matter of science, art, or skill, and it is not necessary that a witness should be shown to be qualified as an expert before he can be thus interrogated.

A memorandum, in the handwriting of an agent or servant of a corporation, upon the back of a receipt, given to the corporation for money paid on account of the contract to which the memorandum relates, cannot be presumed to have been upon the paper at the time of giving the receipt, and is of itself no evidence against the party signing the receipt.

An objection to evidence will not be considered by this court on a case made and reserved, or on exceptions allowed, as having been taken on the ground that it was to prove the contents of a writing, unless it is so stated. Whatever is necessary to be done in order to accomplish to work specifically set forth in a contract as agreed to be performed, is parcel of the contract though not specified therein.

July Term, 1857. *Sullivan.*

KEYSER *v.* SCHOOL DISTRICT, No. 9, IN SUNAPEE.

Committees of school districts — Buildings standing on land of another.

A committee legally appointed to purchase, remove, or repair a school-house, are public officers and within the statute, which gives a majority of a board of such officers' authority to act for the whole.

Where a school district pass a legal vote to purchase a building for a school-house, and certain persons, acting as a committee of the district, make a bargain for the purchase of the building at an agreed price, if the district take possession and retain and occupy the building under the purchase for a school-house, in an action against them by the owner of the building, to recover the price, they cannot deny the authority of the committee who made the purchase in their behalf, and are bound, in the absence of fraud or mistake, to pay the price agreed upon by the committee, although the committee had no antecedent authority to make the purchase.

In such case, the district by claiming and holdlng the building under the purchase, made in their behalf, ratify the action of the committee, and are bound by the ratification, as in the case of natural persons.

If the owner of a building, standing on land of another by his license, sell the building at an agreed price, and the purchaser take possession and hold the building under the sale, the owner may recover the price in an action of general *indebitatus assumpsit* for goods sold and delivered. In such case, no deed or other writing is necessary to convey the building.

If a building owned by one man, stand by mere license on the land of another, the owner of the building has no interest in the land.

DOLE *v.* ERSKINE.

Cross actions in assault and battery — Power of commissioners under act of 1852.

In assault and battery, if the person first assaulted uses excessive force beyond what is necessary for self-defence, he is liable

for the excess, and the facts may be shown under the replication of *de injuria.*

A recovery may be had in cross actions for the same affray, by the assailed party for the assault and battery first committed upon him, and by the assailant for the excess of force used beyond what was necessary for self-defence. Where under the act of 1852, an action against two or more defendants is referred to a commissioner to state the facts, the commissioner has no power to discharge one of the defendants so as to make him a witness for the others.

Taylor *v.* Baron.

Authentication of Records — Foreign administration — Privity of estate.

Where, by the laws of another State, the report of the commissioners upon an insolvent estate, is to be returned to the probate court, and to be there accepted and recorded, a copy of the record may be authenticated under the statute of the United States as a record of the probate court.

The decision of such commissioners, disallowing a claim presented to them in Vermont, will not be a bar to the same claim, when presented here to the commissioners appointed in this State. There is no privity between an administrator appointed in Vermont, and an administrator appointed in this State. No act of an administrator appointed abroad can affect the rights or duties of an administrator appointed here, in relation to the estate which is by law to be administered here.

July Term, 1857. *Cheshire.*

Chapin *v.* School District, No. 2, in Winchester.

Conveyances in trust for charitable purposes.

A gift of real or personal estate to promote education is a charity.

A corporation may be the trustee of a charity, provided the trust be not repugnant to or inconsistent with the proper purposes for which the corporation was created. If a corporation be incompetent to hold as a trustee, that will not make void the devise or grant, but equity will appoint a new trustee to carry out the objects of the charity.

A variation from the strict legal designation, in a devise or conveyance to a corporation for charitable purposes, will not make void the devise or grant, provided the corporation meant can be sufficiently ascertained from the terms used.

A grantor, "in consideration of helping to support and maintain a school for the purpose of teaching the art of reading, writing, and arithmetic in the second school district, in the town of W." conveyed "unto the inhabitants of the district forever, for the sole purpose of supporting a school in the district, a tract of land, to

have and to hold the same to the said inhabitants of the said second school district and their successors forever." He also, at a subsequent time, made another conveyance of another tract, in consideration of one dollar and other valuable considerations, to William Allen, agent of the district, "or to his successor as agent for said school district forever;" "the profits and rents of which are forever to be applied for the benefit of the inhabitants of the district, for building a meeting-house thereon, and towards the support and maintenance of worthy ministers of the gospel," to have and to hold to "him the said William and successor as agent of said district." Both deeds contained the usual covenants of warranty.

Held, that the conveyances were in trust for charitable purposes, and not upon condition. That the district was a good trustee under the first deed, and that the grantee was sufficiently designated to take by the deed. That the district could not be a trustee under the second deed, the object of the trust being inconsistent with the design for which school districts are created; but that the beneficiaries being sufficiently ascertained, a court of equity would appoint a trustee to uphold the charity.

Hopkins *v.* Hopkins.

Divorce — Domicil of libellants — Jurisdiction.

Where the alleged cause of divorce is such that it must have continued three years next preceding the filing of the libel, in order to entitle the party petitioning to a decree annulling the marriage contract, it must be alleged and proved that the domicil of the libellant has been in this State during that period, in order to give the court jurisdiction.

Where the causes of divorce alleged, were willing absence without making provision for the support of the wife, abandonment without cause and without consent, refusal to cohabit, and habitual drunkenness, and it appeared that the husband deserted the wife in Massachusetts, more than sixteen years before the filing of the libel, and since then had resided most of the time in this State, but it was not alleged or proved that the wife had since acquired any domicil in this State, her residence, on the contrary, being shown to have continued uninterruptedly in Massachusetts from the time of the desertion, except when she came into this State and remained seven weeks, for the purpose of filing her petition for divorce; it was *held*, that the court had no jurisdiction to decree a divorce, however clearly the libellant might have been entitled to such decree, had her domicil been in this State during the three years next preceding her application therefor.

WHITNEY *v.* WHITNEY.

State insolvent laws — Effect of discharge — Constitutional provision.

A discharge under the insolvent laws of Massachusetts, is no bar to a suit upon a judgment rendered in Massachusetts, against citizens of that State, in favor of those who have ever been citizens of Maine, upon drafts or bills of exchange drawn by the plaintiffs, in Boston, upon the defendants in Boston, and by the defendants there accepted, payable generally to the order of the plaintiffs, but not paid, although obtained after the rendition of that judgment. The rights and liabilities of the parties are in no way changed by the conversion of the original indebtedness upon drafts or bills, into a judgment.

The clause of the Constitution of the United States, prohibiting the several States from passing any law impairing the obligation of contracts, should be so construed as to protect citizens of the United States resident in any State, creditors of citizens resident in other States, against the operation of the insolvent laws of the states of their debtors, in all cases where their constitutional privileges have not been in some way waived.

If a discharge under State insolvent laws be holden effectual to extinguish all contracts made within the State between its own citizens, unless those contracts are negotiable, and by their express terms to be performed in other States, and, without being discredited, have been actually sold and assigned to citizens of other States, prior to the proceedings resulting in such discharge ; and if such discharge be holden inoperative to destroy the obligation of contracts made within the State where it is granted, between citizens of that State and those of other States, unless the holders thereof have in some way waived their constitutional rights ; and likewise inoperative to defeat contracts made and to be performed without the State, unless made and continuing to exist between citizens of that State, down to the period of the proceedings resulting in such discharge, — the true purpose and design of the constitutional inhibition will be accomplished, and the sovereignty of the States, so far as consistent with the constitution, vindicated.

July Term, 1857. *Belknap.*

HACKETT *v.* BOSTON, CONCORD & MONTREAL RAILROAD CO.

Confession of damages — Liability of common carriers.

A confession will be construed according to the natural import of its terms, and will not be extended beyond them. The testimony of a witness as to time or distance, or as to the dimensions or qualities of an object, will not be rejected, because they imply an opinion of the witness.

It is a defence for a common carrier, that the damage com-

plained of resulted from causes for which he was not responsible. If goods are not delivered by the fault of the carrier, he is liable for their value at the time and place of delivery, deducting freight, if that has not been paid. If the goods are delayed or damaged by the fault of the carrier, he is answerable for the difference between the value of the article, if safely and seasonably delivered, and its actual value when delivered or ready for delivery.

If the character of goods is substantially changed by the fault of the carrier, so as to be unfit for the ordinary uses of such articles, neither the consignee nor the owner is bound to receive them, and the carrier is answerable for the whole value; but if the goods are rendered unfit only for some special use, and remain fit for the ordinary uses of such property, the carrier is not liable for their whole value, but only for their depreciation. The property of the goods is not vested in the carrier by a recovery against him, unless the full value is awarded.

No exception can be taken to the charge of a judge, because he does not state the law, upon a point which does not arise in the case, though he may refer to it, as a matter which the jury need not consider.

Ladd *v.* Wiggin.

Levy of execution — Fraudulent conveyance — Prior mortgage.

The return of the levy of an execution upon real estate, is conclusive against all the world as evidence that, thereby, as between the parties, the title of the debtor in the estate levied upon passed to the creditor. Evidence to contradict the levy as effectual between the parties, to pass the title of the debtor in the property levied upon will not be received.

A conveyance of real estate absolute in its terms, but made for the purpose of securing a debt, with an agreement or understanding between the parties, that the land is to be reconveyed upon payment of the debt and interest, is fraudulent and voidable, not only against existing creditors of the grantor, but against those who have become such after its execution. Nothing but payment in fact of the debt, or a release by the mortgagee, will discharge a mortgage, where equity requires its continued existence. A subsequent security for a debt of equal degree, with a former for the same debt, will not by operation of law extinguish it.

Where the note secured by a valid, pre-existing mortgage is given up to the mortgagor upon the execution by him to the mortgagee of a fraudulent conveyance of the premises, and the amount thereof is included in the debt intended to be secured by the fraudulent conveyance, the original mortgage is not thereby extinguished or discharged, but where the fraudulent conveyance is avoided by the creditors of the mortgagor, the mortgagee is remitted to his previously existing legal rights under the mortgage.

The avoiding of the fraudulent conveyance prevents the purchaser from taking anything by his fraudulent contract, and permits the creditors to take all their creditor fraudulently conveyed and nothing more.

Tilton *v.* Tilton.

Probate appeal — Construction of statute — Mistake.

The first section of the 170th chapter of the Revised Statutes, which provides that any person aggrieved by the decree of a judge of probate may appeal therefrom to the superior court next to be holden in the county, is to be construed in connection with the second and fourth sections of the same chapter, so that, if the appeal be taken under the first and second sections at so late a period, that notice cannot be given thereof, as required by the fourth section, before the first term of court, the appeal may be taken and notice given for the next subsequent term, being the next term after the appeal is taken, at which it is practicable, consistently with the requirements of law, to enter and prosecute the same.

Where a decree was made October 21, 1856, and an appeal taken December 18, 1856, within sixty days after, and the same was entered at a term of the supreme court, holden December 23, 1856, and notice of the appeal being taken to that term was subsequently given by publication, there having been no opportunity for such notice prior to the term, it was *held*, that the notice was insufficient and the proceedings erroneous, and the appeal was dismissed without costs or prejudice.

Misapprehension of the law in such case, is such a mistake as will entitle the party to relief, upon a petition for leave to appeal, presented conformably to the provisions of the seventh section of the 170th chapter of the Revised Statutes.

July Term, 1857. *Carroll.*

Colby *v.* Copp.

Liability of co-creditor as bailee — Application of payments.

Where two persons are owners of a note and mortgage, the person in whose possession the securities are left, is not answerable in case of the loss of the debt, unless for gross negligence. If the holder of a note, due to himself and another, has also a note due to himself alone, and a payment is made to him by the debtor without any designation of the claim to which it is to be applied, he is bound to apply it rateably upon his own and the joint demand.

Supreme Judicial Court of Massachusetts.

Berkshire. September Term, 1857.

Present: Shaw, C. J., Dewey, Metcalf, Bigelow, and Thomas, JJ.

Benjamin *v.* Wheeler.

Action.

Evidence that the surveyors of highways acted maliciously or without necessity in constructing, within the scope of the authority conferred on them by Rev. Sts. c. 24, § 5, a watercourse on the premises of an individual, will not sustain an action against them or their servant.

J. Rockwell and *J. Price*, for defendant.

I. Sumner and *J. E. Field*, for plaintiff.

Carson *v.* Western Railroad Corporation.

Action.

A railroad corporation who erect, on land purchased by them in fee for the purposes of their road, a fence to keep the snow from being blown upon their road, are not liable for damages sustained by the owner of the land on the other side of the fence, by the accumulation of snow, so occasioned, on his land.

I. Sumner and *N. L. Johnson*, for plaintiff.

J. Rockwell, for defendants.

Chappell *v.* Hunt.

Levy of execution — Description of the land — Evidence — Officer's return.

A levy of execution on land by appraisement, which does not state in what town the land is, and which describes the land only as bounded on a certain highway, and thence by specified courses and distances to stakes and stones, and back to the highway, is valid, if by parol evidence of the bounds so given, the land can be identified to the satisfaction of a jury. But the testimony of the officer and appraisers as to what land is intended to be set off is inadmissible.

The return of an officer upon an execution levied on land, that one of the appraisers was chosen by "A. B., the attorney of the debtor," sufficiently shows that one appraiser was chosen by the debtor, within the provision of Rev. Sts. c. 73, § 3.

I. Sumner, for demandant.

M. Wilcox, for tenant.

COLLINS *v.* STEPHENSON.

Evidence — Witness.

The introduction of irrelevant testimony by one party, without objection, does not entitle the other party to contradict such testimony by other witnesses.

A witness who testifies upon cross examination that he has not uttered threats against the party cross examining him, may be contradicted on that point by other testimony.

I. Sumner and *J. Price*, for defendant.

M. Wilcox, for plaintiff.

MAHER *v.* DOUGHERTY.

Pleading.

A declaration on a contract for the sale of liquors, need not state that the sale was authorized by law.

J. Price, for defendant.

J. T. Robinson, for plaintiff.

LESTER *v.* LESTER.

Amendment.

A writ against one individually, may be amended by leave of court, so as to charge him in his capacity as administrator.

J. Price, for plaintiff.

I. Sumner, for defendant.

STEVENS *v.* TAFT.

Judgment.

Judgment for the tenant in a writ of entry, is no bar to an action of trespass by the demandant against the tenant for breaking and entering the same close, although their respective titles remain the same. But it is conclusive evidence of the title.

J. E. Field, for plaintiff.

I. Sumner and *B. Palmer*, for defendant.

WATERMAN *v.* TROY AND GREENFIELD RAILROAD CO.

Contract — Interest.

An agreement of a railroad corporation with a subscriber for stock therein, that he "shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation," does not bind the road to pay him any interest until the road goes into operation.

J. T. Robinson, for plaintiff.

H. L. Dawes, for defendants.

Canfield v. Miller.

Judgment — Satisfaction.

Where the creditor by mistake returns an execution as wholly satisfied, when in fact it was only partially so, he may maintain an action on the judgment for the balance remaining due.

C. N. Emerson, for defendant.

B. Palmer, for plaintiff.

Wilbur v. Hickey.

Homestead — Sale by guardian.

St. 1855, c. 238, exempting homesteads from levy on execution, provides that no conveyance by the husband of any property exempted as aforesaid shall be valid, unless the wife join in the deed of conveyance.

Held, that this provision does not apply to a sale made under license of the probate court, by the guardian of a husband, who has been adjudged a spendthrift.

A. J. Waterman, for demandant.

H. L. Dawes, for tenant.

Commonwealth v. Pomroy.

Constitutional law.

§ 17 of St. 1855, c. 215, punishing a common seller of intoxicating liquors, for the first offence, by fine of fifty dollars, and imprisonment in the house of correction, not less than three nor more than six months, is not unconstitutional as inflicting a cruel and unusual punishment, contrary to art. 26 of the Declaration of Rights.

J. Rockwell, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

Commonwealth v. Lahy.

Burden of proof — Intoxicating liquors.

The rule established by St. 1844, c. 102, that in all prosecutions for selling spirituous liquors without license, the burden of proving a license shall be on the defendant, applies to prosecutions for selling such liquors, under the statutes passed since 1844, as well as to those in force when that law was passed.

But in prosecutions for other offences, as for keeping a common nuisance by the use of a house for the illegal sale of intoxicating liquors, under St. 1855, c. 405, the burden remains, according to the general rule of law, upon the government, who must prove the illegality of the sales.

J. E. Field, for defendant.

J. H. Clifford, (Attorney General,) for Commonwealth.

Hampshire, Franklin, and Hampden. September Term, 1857.

Present: The same Justices.

AMHERST AND BELCHERTOWN RAILROAD CO. *v.* WATSON.

Practice act — Interrogatories.

The court cannot nonsuit a plaintiff for insufficiency of his answers to interrogatories under the practice act, until after passing an order, specifying the insufficiencies and directing further answers, and a failure to comply with such order.

The provision in the practice act that each interrogatory shall be answered separately, does not prevent the making of one answer to several interrogatories, to each of which it is responsive.

The adverse party cannot, under the practice act, as of right, and without a specific order of the court, require a corporation to produce all its books and papers in answer to interrogatories.

E. Dickinson, for plaintiffs.

S. T. Spaulding, for defendant.

FISKE *v.* INHABITANTS OF CHESTER.

Domicil — Evidence.

Where the domicil of a person removing from one town to another, is in issue in a suit brought by him against the first town to recover back a tax, he may, since the statutes making parties witnesses, testify whether he intended, by the removal, to change his domicil.

Evidence that the selectmen of a town decided that a person taxed there was a voter, and put his name on the voting list, is not admissible to show that he was properly taxed in that town.

W. G. Bates, for defendants.

R. A. Chapman, for plaintiff.

KELLOGG *v.* INHABITANTS OF NORTHAMPTON.

Highway.

In an action to recover of a town damages sustained by a defect in a highway, evidence that the place where the accident happened was originally wrought for the accommodation of the abuttors, is immaterial, if it appear that that part of the highway has since been put in a condition for public travel, and repaired as such by the town.

S. T. Spaulding, for defendants.

C. Delano, for plaintiff.

COMMONWEALTH *v.* MAHAR.

Larceny in a building.

A defendant having been convicted of larceny "in the refresh-

ment saloon of A. B." is to be sentenced for a simple larceny, and not for larceny "in a building."

W. Allen, Jr., for defendant.

D. W. Alvord, (District Attorney,) for Commonwealth.

Commonwealth v. Norris.

Intoxicating liquors — Sale.

A sale of intoxicating liquors on credit, is a sale within the meaning of St. 1855, c. 215, prohibiting the manufacture and sale of spirituous and intoxicating liquors, notwithstanding the provision in § 37, that no action shall be maintained for the price of liquors unlawfully sold.

Where the last only of several distinct papers, which together constitute the record of a justice of the peace in a criminal case, is certified by the justice as "a true copy," the record is not sufficiently attested, and if a trial be had on such papers in the court of common pleas on appeal, the defendant is entitled to a new trial.

W. Griswold, for defendant.

D. W. Alvord, (District Attorney,) for Commonwealth.

Commonwealth v. Fogerty.

Indictment — Rape.

An indictment for rape, which alleges that the defendant "violently and against her will, feloniously did ravish and carnally know" A. B., is sufficient, without alleging that the offence was committed "by force."

An indictment for rape need not allege that the woman ravished was not the wife of the defendant.

G. M. Stearns, for defendant.

D. W. Alvord, for Commonwealth.

Commonwealth v. King.

District Attorney pro tem. — Evidence.

In the absence of the district attorney, the court may appoint a district attorney *pro tem.*, and may authorize another attorney, acquainted with the facts, to assist him, if not otherwise interested in the case than by having appeared for the Commonwealth before a magistrate, and by acting as clerk at the inquest under St. 1854, c. 424, on the causes of the fire for setting which this indictment is found.

The testimony of a witness reduced to writing and signed by him at a fire inquest, under the statute of 1854, c. 424, is admissible against him on a trial for setting the fire.

E. W. Bond, for defendant.

D. W. Alvord and *W. L. Burt*, for Commonwealth.

DOWNING *v.* PORTER.

Intoxicating liquors — Complaint and warrant.

A description in the warrant for the seizure of intoxicating liquors, under St. 1855, c. 215, which differs from the description in the complaint only by misnaming one street in the description of the place where the liquors are kept, is sufficient, if it in other respects so describe the premises as to identify them with those named in the complaint.

Where the complaint in such case is sworn to, the warrant will be sufficient without any further oath, notwithstanding the provision of § 25 of the statute above cited, that "the warrant to be issued on said complaint shall be supported by the oath or affirmation of the complainant."

Under Sts. 1855, chs. 215, 397, a description of the liquors intended to be seized, as "a certain quantity of rum, about and not exceeding one hundred gallons," is sufficient, although the quantity seized be much less.

HOOKER *v.* PYNCHON.

Contract — Specific performance.

An agreement for the sale of land owned in common, which purports to be executed by all the tenants in common, and is in fact executed by and delivered as the deed of some of them, may be enforced in equity against them, although the other tenants have not executed it, and although the agreement provides for the forfeiture of a certain sum as liquidated damages for any breach.

F. Chamberlin and *C. A. Winchester*, for plaintiff.

E. W. Bond, for defendant.

Notices of New Publications.

THE ADMIRALTY JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES, with an Appendix, containing the new rules of Admiralty practice, prescribed by the Supreme Court of the United States, those of the Circuit and District of the United States for the Northern District of New York, and numerous practical forms, &c. By ALFRED CONKLING. Second Edition, revised and corrected. Albany: W. C. Little & Co. 1857. 2 vols. pp. 475, 630.

JUDGE CONKLING'S book is well known to our readers as a correct and useful manual of the admiralty law, as well as of the practice of admiralty courts. The present edition has been somewhat modified to meet the

changes, which the constantly increasing business of the district courts and the extension of their jurisdiction by statute has occasioned. The main features of the work, and the practical forms, however, remain the same as in the first edition, and although its bulk is somewhat increased, its price is actually diminished. When the former edition was published, the author was judge of the district court of the United States, for the Northern District of New York, in which office he was called upon to administer the admiralty law, especially as applied to questions arising in the commerce and navigation of our great lakes and the waters connecting them. The act of Congress of 1845, purporting to extend the jurisdiction of district courts to cases arising on these waters, had not then been construed by the supreme court. This has now been done, and the case of *The Genessee Chief*, 12 How. 443, which substantially overrules the case of *The Thomas Jefferson*, 10 Wheat. 428, is ably discussed by our author. The earlier decision, made in 1825, had restricted the admiralty jurisdiction to matters arising within the ebb and flow of the tide, thus removing a great department of really maritime contracts and torts from the reach of the district courts. An intimation was, however, made in that case, that Congress might find under their power to regulate commerce, a mode of investing the national courts with the chief part of this most desirable jurisdiction. Under this apprehension, perhaps, Congress, in 1845, passed the act in question, purporting to extend to the district courts jurisdiction over matters relating to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and engaged in trading between different States. By the decision in *The Genessee Chief*, the supreme court have now held, what is undoubtedly the true doctrine, that the power to regulate commerce is inadequate for the desired purpose, but that the original grant of admiralty jurisdiction covers the subject. We agree with our author in his regret that the act should stand as an apparent restriction upon a general power, but we cannot agree with him that the court should have held it void, for if Congress have power over the subject, it cannot render the exercise of the power void, that they have mistaken its source. The only remedy, if any is needed, is with the legislature itself.

Another case much discussed by our author, in this edition, is *The Globe*, 13 Law Rep. 488, decided by himself as district judge, and overruled by Mr. Justice Nelson, as judge of the circuit court, 15 Law Rep. 421. In this case the validity and effect of a law of Ohio, giving a remedy against vessels navigating the waters of that State, and of a sale by virtue thereof, were in controversy. It seems that a sort of proceeding *in rem* was authorized by that law, but without the usual provisions for notice to parties interested, and apparently without any direction to apply the proceeds of a judicial sale towards the payment of any claims except those on which the suit happens to be founded. Judge Conkling decided that a sale under this act did not transfer the vessel, so as to discharge existing maritime liens, not represented in the proceedings. Judge Nelson overruled this decision, and his opinion is treated with a good deal of contempt by our author. The discussion will be found at the 87th and subsequent pages of the first volume, and we commend it to the attention of our readers. We have no doubt that the district judge was right in his decision, and that the cause of justice was injured when it was set aside. But the language which he uses towards Judge Nelson is out of place in a scientific treatise. It is not agreeable for a judge to have his opinion overruled, and it happens to judges of our district courts that their decisions, in causes where the amount involved is not very large, are subject to the supervision of a single judge, whose training and professional habits

are not always such as to render their opinions on the peculiar doctrines of admiralty law of especial intrinsic value. In such cases it is peculiarly disagreeable, if the district judge is conscious of having carefully considered the subject, to see or imagine that his opinion is slighted. But for all this, and supposing it all to apply to the present case, it does not comport with the dignity of the parties or of the subject to retort by a reflection upon the general qualities and fitness for office of a mistaken superior. In some other places our author indulges in some severity of remark upon the opinions of the same judge. See vol. i. p. 417, and vol. ii. p. 593. If these blemishes are excepted, the work, always valuable, has gained in usefulness by the additions which the learned author has made in this edition. We miss a table of cases, without which no treatise can be said to be perfectly finished.

A Treatise on American Railroad Law. By Edward L. Pierce, of the Boston Bar. New York: John S. Voorhies, 1857.

This volume, as the author informs us, "is designed to reduce to a compact and accessible form the law of railroads, as it has been judicially declared in this country." It has the advantage of being the first book of the kind upon a subject of increasing interest. English Railway and Canal Cases, Walford, Holmes, and Shelford on Railways, are nothing more than collections of the decisions and statute laws of England. In this country a late and unfinished collection of cases by Smith and Bates and Bennett's edition of Shelford, besides a compilation of Railroad Laws and Charters have hitherto formed the only source of information upon this great subject; although a treatise has for some time been announced as in preparation, and will be warmly welcomed, by that eminent jurist, with whose decisions and writings readers of this journal are well acquainted, Chief Justice Redfield of Vermont.

The book before us consists of 535 pages of reading matter, and with the exception of a few typographical errors, it is presented in excellent style. The table of contents is so arranged as to refer to the pagings of the subdivisions of each chapter, which much enhances its utility. It contains a table of over 1500 cases, and the notes abound in copious extracts from the most important of them.

The arrangement of the subject is of a convenient, rather than philosophical order. The subdivisions of some of the chapters are often very short, some of them consisting of only a sentence. This, in one or two instances, is carried to an extreme, as on page 376, where a paragraph is headed with a title for the express purpose of informing the reader that the subject has already been treated of in a different part of the book. This reminds us of an author, we once read of, who in writing a book on the Natural History of Ireland, headed a chapter on Snakes, and immediately under it, wrote, "There are no snakes in this country."

The first chapter, on the Formation of a Railroad Company, is concise and exact, composing a very lucid introduction to the work. Then follows a chapter on the Constitution and Extent of Powers, in which the general rules of construction are well expressed, but the discussion of the most important powers is postponed to the end of the book. This, coupled with the citation there of one of Judge Curtis's decisions yet unpublished, would seem to imply that that part of the subject had been delayed for more authority or deeper research. After a chapter on the Power of the Legislature over the Company, and a short one on the Taxation of Companies, which is of the nature of a brief digest of the cases, without any discussion of the constitutional questions, the author proceeds to develope the law

governing the stock. The power of municipal corporations to purchase railroad stock, is discussed at some length. But he seems to have passed over a question which would naturally occur to the reader here. It is whether a railroad can acquire and hold stock in other companies.

The power of a railroad to acquire real estate, by voluntary conveyance, is treated in too general a manner. We are told that this power is limited to the necessary purposes of the company. Can it receive land by donation for no specific object? or by mortgage in the ordinary transactions of business? or can it invest its surplus capital in real estate? These questions are not touched on here, and yet they are not without notice in some of the reports.

Passing over the chapters on the Acquisition of Real Estate by Condemnation, Location of the Road, Liability for Torts, and Injuries to Persons and Damage to Property, also the Contracts of Companies, which are all treated with the appearance of labor and skill, we come to a railroad considered as a common carrier of goods and passengers. The nice and important questions in this part of the law are well brought out, and, indeed, we consider this the best portion of the book, and think it should be read by the whole travelling community.

In the last chapter on the Transfer and Mortgage of their Property and Franchises, the author seems to incline to the opinion, supported by a dictum of Judge Curtis, that a railroad has the right to mortgage some of its franchises. While he admits that the privilege of being a corporation, and an exercise of the Right of Eminent Domain, are franchises so peculiar in their nature as to be improper subjects of sale, he nevertheless holds that property and rights acquired under them, such as owning and operating a road, although classed as franchises, are assignable in their nature and can be mortgaged.

The style of this book is perspicuous and simple, and without any show of elaborate reasoning upon the various questions which would seem to invite it.

A Treatise on the Law of Contracts. By William W. Story, Counsellor at Law. 2 vols. 8vo. Boston: Little, Brown & Co. 1856.

The first edition of this work, under the title of "A Treatise on Contracts not under Seal," was published in 1844, in a volume of 472 pages. The book before us is the fourth edition in two volumes, pp. 782, 820. The change of title in this last edition is observable, though in Part i. ch. 1. § 3, the author declares his intention to confine himself to the consideration of the principles applicable to simple contracts.

It is difficult to form a true estimate of the value of such a book, from a reviewer's examination, without the test of actual use in the preparation of cases, or the investigation of specified topics of the law, but the fact that this work has, in the space of twelve years, reached a fourth edition, and that its author has been encouraged by its success to enlarge its size nearly four fold, is a pretty sure proof that it is looked upon with favor by the profession.

The topics treated of seem to exhaust the whole subject of simple contracts. A new work on this great *doing* of the law, as the author well terms it, has become necessary for the exigencies of business; and these and the progress of an enlightened jurisprudence, have so altered principles and enlarged remedies, that new editions of books, like Chitty on Contracts, could hardly be made useful, no matter what amount of industry and

learning might be expended in bringing them up to the standard of the times. Thus, the subject of the fifteenth chapter, Part i., "Novation," is almost new, and the principle, relating to the assignment of *choses in action* with the remedies of the assignor, have been so much enlarged, that these two subjects have become very important topics in the law of contracts. The first of these topics is treated by Mr. Story in this volume, at much greater length than by Professor Parsons, in his valuable work on the same subject, and with great clearness and ability.

There are, however, some faults in this book, which we feel bound to notice, growing out of a disposition to generalize largely from too narrow premises.

Thus in vol. i., p. 446, ch. xiv., § 376, it is stated that "Courts of law, however, now follow the doctrine of equity, as far as possible, without infringing upon established principles of common law, *and the beneficial interest of the assignee is so far protected, that the defendant may set off a debt due to the assignee in like manner, as if the suit had been brought in his name.*" The part of this sentence in italics is stated as a general principle of law, and only one case in the circuit court of the United States is cited in its support. With all deference for Mr. Story, we must express the opinion that whatever may have been decided on the circuit in question, the principle announced in this passage is not, and is not likely to become a correct statement of the common law, but that, on the contrary, the general and well settled principle is, that such a set-off will not be allowed at common law, and that such a principle, however salutary, cannot be engrafted upon it except by statute.

Again, in vol. i., part ii., ch. xxx., p. 452, § 893, it is said, "Estates at will are at the present day almost unknown in practice, although they may be created by special agreement, and all leases without limit as to the period of holding, create a tenancy from year to year." The statement in the first part of this passage as to the infrequency of estates at will, we apprehend to be incorrect. We believe a vast amount of real estate in this city is so held by tenants, especially in the letting of lodging-houses and rooms to the poorer and more destitute classes. And as the proposition that "all leases (Mr. Story is here speaking of parol leases) without limit as to the period of holding, create a tenancy from year to year," a practitioner in Massachusetts, who should take this assertion for verity and advise his client accordingly, might have cause to rue his haste in not looking at the statutes, which make all holdings, under parol leases, nominally estates at will, and in effect tenancies from quarter to quarter or month to month, according to the times at which rent is payable.

In closing, we cannot but advert to the rare combination of intellectual gifts possessed by the author of these volumes. He is quite a young man, but more than twelve years ago he had written a legal treatise which has been constantly growing in favor with the practical lawyer, and which is worthy of a place on the same shelf with the great works of his father, and since then he has shown the power to reproduce the living form and features of that illustrious father in an imperishable form. Such a union of hard talent and fine genius is rare. Unless thus found together, they might well be thought incompatible.

We wish Mr. Story all success, whether he follows the thorny paths of the law, or the more delightful, but we apprehend not less difficult pursuits of artistic and poetical endeavor.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Ayres, Robert	Boston,	August 3, 1857.	Isaac Ames.
Baker, Leonard	Dudley,	" 1,	Alexander H. Bullock.
Bass, Samuel (*a*)	Lynn,	" 4,	Isaac Ames.
Bassett, Lyman H.	Charlestown,	" 17,	L. J. Fletcher.
Bates, Edward C. (*b*)	Boston,	" 21,	Isaac Ames
Bates, Gustavus D.	Plymouth,	" 10,	David Perkins.
Bates, Ives G. (*b*)	Boston,	" 21,	Isaac Ames.
Berry, Christopher	Charlestown,	" 25,	L. J. Fletcher
Blair, Luke K.	Palmer,	" 1,	John M. Stebbins.
Chase, Jacob	Waltham,	" 19,	L. J. Fletcher.
Childs, Isaac	Lynn,	" 10,	Henry B. Fernald.
Converse, Albert F.	Reading,	" 24,	L. J. Fletcher.
Cooledge, Daniel (*c*)	Lowell,	" 14,	L. J. Fletcher.
Crockett, Nath'l W.	Holliston,	" 25,	L. J. Fletcher.
Dana, Benjamin	Watertown,	" 26,	L. J. Fletcher.
Dana, Dexter	Roxbury,	" 7,	Francis Hilliard.
Davenport, George	Roxbury,	" 29,	Francis Hilliard.
Edes, Abial	Natick,	" 5,	L. J. Fletcher.
Farrar, Henry A. (*d*)	Boston,	" 22,	Isaac Ames.
Gay, Ebenezer	Bridgewater,	" 7,	David Perkins.
Goodwin, Henry W. (*d*)	Boston,	" 22,	Isaac Ames.
Gutterson, Charles C.	Boston,	" 31,	Isaac Ames.
Herrick, Charles P. (*e*)	Lowell,	" 27,	L. J. Fletcher.
Hoar, J. N.	Groton,	" 25,	L. J. Fletcher.
Hobbs, Samuel M.	Boston,	" 29,	Isaac Ames.
Ingalls, Albert B.	Lynn,	" 18,	Henry B. Fernald.
Ingalls, Albert B.	Lynn,	" 22,	Henry B. Fernald.
Jenks, Edward A. (*c*)	Lowell,	" 14,	L. J. Fletcher.
Jones, Rufus	Wilbraham,	" 28,	J. M. Stebbins.
Lee, Chandler S.	Fitchburg,	" 19,	Alexander H. Bullock.
Loud, Noah	Salem,	" 5,	Isaac Ames.
Loutrel, Alfred M.	Boston,	" 13,	Isaac Ames
Middlebor'gh Steam Mill Co.		" 27,	David Perkins.
Pond, John V.	Salem,	" 29,	Henry B. Fernald.
Pratt, Orrin	Buckland,	" 29,	Horace I. Hodges.*
Richardson, Benj. R.	West Roxbury,	" 10,	Isaac Ames.
Skinner, Henry Bates.	West Roxbury,	" 18,	Isaac Ames.
Smith, Thomas	Leicester,	" 29,	Alexander H. Bullock.
Sparrel, James N. Jr. (*f*)	East Bridgewater,	July 25,	David Perkins.
Thompson, Jason S.	Wrentham,	Aug. 19,	Francis Hilliard.
Tuttle, Nathaniel	Salem,	" 7,	Henry B. Fernald.
Tuttle, Samuel J. (*e*)	Lowell,	" 27,	L. J. Fletcher.
Warren, Ira	Boston,	" 13,	Isaac Ames.
Weston, Wm. B. (*b*)	Boston,	" 21,	Isaac Ames.
Williams, John (*a*)	Lynn,	" 4,	Isaac Ames.
Wooding, Calvin (*f*)	East Bridgewater,	July 25,	David Perkins.

(*a*) Williams & Bass.
(*b*) Edward C. Bates & Co.
(*c*) Cooledge & Jenks.
(*d*) Farrar & Goodwin.
(*e*) Herrick & Tuttle.
(*f*) Wooding & Sparrell.

* In place of Judge Newcomb who was sick.